ATTORNEY'S FEES AWARDS

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

SECOND SESSION

ON

S. 585

A BILL TO PROVIDE A SPECIAL DEFENSE TO THE LIABILITY OF POLITICAL SUBDIVISIONS OF STATES UNDER SECTION 1979 OF THE REVISED STATUTES (42 U.S.C. 1983) RELATING TO CIVIL ACTIONS FOR THE DEPRIVATION OF RIGHTS;

AND ON

AMENDMENTS TO BE PROPOSED BY SENATOR ORRIN G. HATCH

MARCH 1, 1982

Serial No. J-97-99

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ATTORNEY'S FEES AWARDS

MONDAY, MARCH 1, 1982

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 2:05 p.m., in room 2228, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the subcommittee) presiding.

Present: Senator DeConcini.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH, CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

Senator HATCH. The meeting will come to order.

The purpose of this hearing is to consider the awarding of attorney's fees under 42 U.S.C. 1988. During the 4 days of hearings which I chaired last summer to consider the extent of State and local government liability under section 1983, virtually every witness discussed attorney's fees awards as a major component of that liability. State and local government witnesses testified that high fee awards were unduly burdensome on already strained public treasuries and provided incentive for the bringing of highly questionable or frivolous suits which were costly for the government unit to simply defend itself against. I have drafted some amendments to section 1988 which would modify the awarding of attorney's fees to reduce the burden on State and local governments while maintaining the original purpose of the fee award. Because of the critical importance of this issue, I have decided to hold this hearing so that the subcommittee could be advised on specific provisions which might be considered.

The Civil Rights Attorney's Fees Awards Act of 1976, now codified in 42 U.S.C. 1988, was enacted for the laudatory goal of providing poor people with the opportunity to attract competent counsel to remedy violations of their constitutional rights. The Fees Act provides that the prevailing party will be awarded reasonable attorney's fees in actions under several civil rights statutes, the most important of which is 42 U.S.C. 1983. Suits brought under section 1983 have dramatically increased in recent years and now represent a substantial portion of the suits brought in Federal courts. But the damage awards recovered by prevailing plaintiffs in these cases are often not enough to attract an attorney on a contingent fee basis, and often the plaintiffs are poor. Thus, the 1976 Fees Act was intended by Congress to increase the enforcement of individual civil rights by providing incentive for attorneys to represent individuals who otherwise could not afford to pay for the attorney's services in these civil rights suits. I applaud the overall goal of the Fees Act, and I feel that in the years since its enactment, it has aided many impecunious individuals in enforcing their civil rights. To that extent, the Fees Act has been very beneficial.

However, the application of the Fees Act has not been without criticism, and I believe much of this criticism is warranted. Justice Sandra D. O'Connor, before she became a member of the Supreme Court, wrote in a William and Mary Law Review article that the burden of section 1983 litigation could be beneficially reduced, "by limiting or disallowing recovery of attorney's fees. Such a move," she said, "would be welcomed by State courts, as well as State legislatures and executive officers."

I am aware of several State attorneys general who are usually considered quite liberal but who have expressed the view that the Fees Act has resulted in such burdens and inequities that it should be repealed. Many local government officials I have spoken to have expressed concern about the substantial fee awards they have already paid, the increasing amounts of money that are being diverted from public services to legal defense, and their view that a number of these suits are simply being brought to collect attorney's fees.

Before briefly discussing some of the changes I am proposing, I want to clearly indicate what these provisions would not change: A prevailing plaintiff will still recover attorney's fees which will compensate his attorney at the prevailing market rate, and no plaintiff need fear having to pay the other party's attorney's fees, even if he loses the cases, as long as his claim is not frivolous or groundless.

The language of section 1988 makes no distinction between prevailing defendants and prevailing plaintiffs; however, the legislative history of the Fees Act makes it clear that the so-called dual standard is to apply. The dual standard provides that plaintiffs are to be routinely awarded fees when they prevail, but the defendants are not to recover fees when they win, according to the House report, "if the action is not brought in bad faith."

The dual standard, particularly with the incredible number of lawyers in our country today, creates a tremendous incentive to bring these suits: The lawyer knows that if he can prevail on any part of his claim, he will be awarded his attorney's fees and possibly a bonus on top of that. According to testimony at our previous hearings on section 1983, this situation is resulting in numerous frivolous and questionable suits being brought which are costly to defend against even when the Government wins. In a letter to the subcommittee last week, the attorney general of Louisiana stated that,

> Frivolous lawsuits can be time-consuming. Over 40 hours were spent obtaining a routine motion to dismiss in one of the latest instances of groundless litigation handled by this office.

Some State and local government officials have suggested that a fairer approach, and one which would deter frivolous suits, would be to allow plaintiffs and defendants to recover equally.

The legislative history of the 1976 Fees Act pointed out clearly and correctly, I think, the need for the dual standard: If the persons seeking to enforce their civil rights were faced with paying their opponents' attorney's fees if they simply did not win the case, the Fees Act would create a greater disincentive to bring these civil rights suits that the situation it attempted to remedy. The amendment that I am proposing would clarify that the standard enunciated by the Supreme Court in *Christiansburg Garment Co.* v. *Equal Employment Opportunity Commission* was to apply to prevailing defendants in claims covered under section 1988. The *Christiansburg Garment* standard would provide some deterrent by forcing the plaintiffs to pay the defendant's attorney's fees if the suit was frivolous or groundless. In fact, the standard has been applied in other civil rights fee statutes and has been cited in some section 1988 cases, but I feel it is important that Congress make it clear that, while meritorious civil rights suits are encouraged, those who would file frivolous suits at taxpayer's expense do so at the risk of paying the other party's attorney's fees.

I go into some other areas of concern in my statement. I would ask that my statement be placed in the record.

[The prepared statement of Senator Hatch and the text of S. 585 and the proposed amendment to S. 585 follow:]

OPENING STATEMENT OF SENATOR ORRIN G. HATCH, CHAIRMAN, U.S. SENATE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION, MARCH 1, 1982, HEARING ON THE AWARDING OF ATTORNEYS' FEES UNDER 42 U.S.C. 1988

The purpose of this hearing is to consider the awarding of attorneys' fees under 42 U.S.C. 1988. During the four days of hearings which I chaired last summer to consider the extent of State and local government liability under section 1983, virtually every witness discussed attorneys' fees awards as a major component of that liability. State and local government witnesses testified that high fee awards were unduely burdensome on already strained public treasuries and provided incentive for the bringing of highly questionable or frivolous suits which were costly for the government unit to simply defend itself against. I have drafted some amendments to section 1988 which would modify the awarding of attorneys' fees to reduce the burden on State and local governments while maintaining the original purpose of the fee award. Because of the critical importance of this issue, I have decided to hold this hearing so that the Subcommittee could be advised on specific provisions which might be considered.

The Civil Rights Attorneys' Fees Awards Act of 1976, now codified in 42 U.S.C. 1988, was enacted for the laudatory goal of providing poor people with the opportunity to attract competent counsel to remedy violations of their constitutional rights. The Fees Act provides that the prevailing party will be awarded reasonable attorneys' fees in actions under several civil rights statutes, the most important of which is 42 U.S.C. 1983. Suits brought under section 1983 have dramatically increased in recent years and now represent a substantial portion of the suits brought in Federal courts. But the damage awards recovered by prevailing plaintiffs in these cases are often not enough to attract an attorney on a contingent fee basis, and often the plaintiffs are poor. Thus, the 1976 Fees Act was intended by Congress to increase the enforcement of individual civil rights by providing incentive for attorneys to represent individuals who otherwise could not afford to pay for the attorney's services in these civil rights suits. I applaud the overall goal of the Fees Act, and I feel that in the years since its enactment it has aided many impecunious individuals in enforcing their civil rights. To that extent, the Fees Act has been very beneficial.

However, the application of the Fees Act has not been without criticism, and I believe much of this criticism is warranted. Justice

Sandra D. O'Connor, before she became a member of the Supreme Court, wrote in a William & Mary Law Review article that the burden of section 1983 litigation could be beneficially reduced, "by limiting or disallowing recovery of attorney's fees. Such a move, " she said, "would be welcomed by state courts, as well as state legislatures and executive officers." I am aware of several state Attorneys General, who are usually considered quite liberal, but who have expressed the view that the Fees Act has resulted in such burdens and inequities that it should be repealed. Many local government officials I have spoken to have expressed concern about the substantial fee awards they have already paid, the increasing amounts of money that are being diverted from public services to legal defense, and their view that a number of these suits are simply being brought to collect attorneys' fees.

Before briefly discussing some of the changes I am proposing, I want to clearly indicate what these provisions would not change: A prevailing plaintiff will still recover attorneys' fees which will compensate his attorney at the prevailing market rate, and no plaintiff need fear having to pay the other party's attorneys' fees, even if he loses the case, as long as his claim is not frivolous or groundless.

The language of section 1988 makes no distinction between prevailing defendants and prevailing plaintiffs; however, the legislative history of the Fees Act makes it clear that the so-called dual standard is to apply. The dual standard provides that plaintiffs are to be routinely awarded fees when they prevail, but the defendants are not to recover fees when they win, according to the House Report, "if the action is not brought in bad faith..." H. Rep. No. 94-1558, 7 (1976). The dual standard, particularly with the incredible number of lawyers in our country today, creates a tremendous incentive to bring these suits: the lawyer knows that if he can prevail on any part of his claim, he will be awarded his attorney's fees and possibly a bonus on top of that. According to testimony at our previous hearings on section 1983, this situation is resulting in numerous frivilous and questionable suits being brought which are costly to defend against even when the government wins. In a letter to the Subcommittee last week, the Attorney General of Louisiana stated that, "Frivolous lawsuits can be time consuming. Over forty hours were spent obtaining a routine motion to dismiss in one of the latest instances of groundless litigation handled by this office." Some State and local

GOVERNMENT OFFICIALS HAVE SUGGESTED THAT A FAIRER APPROACH, AND ONE WHICH WOULD DETER FRIVILOUS SUITS, WOULD BE TO ALLOW PLAINTIFFS AND DEFENDANTS TO RECOVER EQUALLY.

THE LEGISLATIVE HISTORY OF THE 1976 FEES ACT POINTED OUT CLEARLY, AND CORRECTLY, I THINK, THE NEED FOR THE DUAL STANDARD: IF THE PERSONS SEEKING TO ENFORCE THEIR CIVIL RIGHTS WERE FACED WITH PAYING THEIR OPPONENTS ATTORNEYS' FEES IF THEY SIMPLY DID NOT WIN THE CASE, THE FEES ACT WOULD CREATE A GREATER DISINCENTIVE TO BRING THESE CIVIL RIGHTS SUITS THAN THE SITUATION IT ATTEMPTED TO REMEDY. THE AMENDMENT THAT I AM PROPOSING WOULD CLARIFY THAT THE STANDARD ENUNCIATED BY THE SUPREME COURT IN CHRISTIANSBURG GARMENT CO. V. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, 434 U.S. 412, WAS TO APPLY TO PREVAILING DEFENDANTS IN CLAIMS COVERED UNDER SECTION 1988. THE CHRISTIANSBURG GARMENT STANDARD WOULD PROVIDE SOME DETERRENT BY FORCING THE PLAINTIFFS TO PAY THE DEFENDANT'S ATTORNEYS' FEES IF THE SUIT WAS FRIVILOUS OR GROUNDLESS. IN FACT, THE STANDARD HAS BEEN APPLIED IN OTHER CIVIL RIGHTS FEE STATUTES, AND HAS BEEN CITED IN SOME SECTION 1988 CASES, BUT I FEEL IT IS IMPORTANT THAT CONGRESS MAKE IT CLEAR THAT WHILE MERITORIOUS CIVIL RIGHTS SUITS ARE ENCOURAGED, THOSE WHO WOULD FILE FRIVILOUS SUITS AT TAXPAYER'S EXPENSE DO SO AT THE RISK OF PAYING THE OTHER PARTY'S ATTORNEYS' FEES.

ANOTHER AREA OF CONCERN IS THE USE OF PENDENT JURISDICTION TO RECOVER ATTORNEYS' FEES IN NON-CIVIL RIGHTS CASES. CURRENTLY, WHEN A PLAINTIFF PREVAILS ON THE BASIS OF A CLAIM WHICH DOES NOT PROVIDE FOR ATTORNEYS' FEES BUT IS JOINED TO A CLAIM WHICH IS COVERED UNDER SECTION 1988, THE PLAINTIFF WILL RECOVER FEES FOR THE ENTIRE SUIT DESPITE THE FACT THAT THE COURT DID NOT REACH THE CLAIM COVERED BY SECTION 1988 AND DESPITE THE FACT THE THE CLAIM MAY HAVE NO MERIT. IN THESE SITUATIONS, THE STANDARD USED TO DETERMINE WHETHER THE SECTION 1988 CLAIM MAY BE JOINED IS THAT IT IS NOT "OBVIOULSY FRIVILOUS" OR "WHOLLY INSUBSTANTIAL." JUSTICE REHNQUIST CHARACTERIZED THIS STANDARD AS PERMITTING JOINDER OF CLAIMS WHENEVER THE "PLAINTIFF IS ABLE TO PLEAD HIS CLAIM WITH A STRAIGHT FACE." PROFESSOR ARTHUR WOLF, WHO I SHOULD NOTE WAS A SPECIAL COUNSEL TO ONE OF OUR DISTINGUISHED WITNESSES, PROFESSOR DRINAN, HAS WRITTEN THAT JOINDER OF CLAIMS, "WILL PROVIDE THE BASIS FOR APPLYING THE 1976 FEES AWARDS ACT IN AN EVER-WIDENING CIRCLE OF LITIGATION, EXPECIALLY IN THOSE LAWSUITS WHERE THE DEFENDANTS ARE PERSONS ACTING UNDER COLOR OF STATE LAW. IT IS NOT IMPROBABLE TO SUGGEST THAT WITH A LITTLE BIT OF CREATIVE THINKING, MANY (AND MAYBE MOST) SUITS INVOLVING STATE ACTION WILL BE COVERED BY THE FEES ACT." 2 WESTERN NEW ENGLAND LAW REVIEW 193, 249.

I BELIEVE, DESPITE A FOOTNOTE IN THE HOUSE REPORT TO THE CONTRARY, THAT CONGRESS DID NOT INTEND, IN ENACTING THE FEES ACT, TO PROVIDE ATTORNEY'S FEES FROM THE PUBLIC TREASURY TO CREATIVE ATTORNEYS IN ANY SUIT AGAINST STATE OR LOCAL GOVERNMENTS REGARDLESS OF WHETHER IT PERTAINS TO CIVIL RIGHTS OR NOT. EVEN IF THIS WAS THE INTENTION OF CONGRESS IN 1976, I BELIEVE THIS POLICY IS UNWISE AND SHOULD BE CHANGED. THE CHANGE I PROPOSE WOULD DIRECT THE JUDGE, IN THESE SITUATIONS, TO MAKE A DETERMINATION AS TO WHETHER IT WOULD HAVE BEEN RATIONAL TO HAVE BROUGHT THE SECTION 1988 CLAIM AS A SEPARATE SUIT. WHILE THIS MAY NOT BE A TOTALLY SATISFACTORY SOLUTION, IT IS BETTER THAN THE TWO ALTERNATIVES--LEAVING THE SITUATION AS IT EXISTS NOW OR NOT ALLOWING FEES UNLESS THE COURT MAKES A FINAL DETERMINATION ON THE CLAIM COVERED UNDER SECTION 1988. THE LATTER COURSE WOULD PROBABLY SEVERELY HAMPER JUDICIAL ECONOMY, WHILE THE FORMER IS TOO BURDENSOME ON STATE AND LOCAL GOVERNMENTS.

ANOTHER PROVISION I AM SUGGESTING WOULD DENY FEES TO A PARTY THAT HAS REJECTED A SETTLEMENT OFFER WHICH WAS AS FAVORABLE TO THE PARTY AS THE RELIEF ULTIMATELY GRANTED BY THE COURT. I HAVE BEEN TOLD BY PLAINTIFF'S ATTORNEYS THAT STATE AND LOCAL GOVERNMENTS OFTEN REFUSE TO SETTLE, AND THUS DRAG OUT LITIGATION, WHERE IT IS CLEAR THAT THE GOVERNMENT IS IN THE WRONG; ON THE OTHER HAND, DEFENDANT'S ATTORNEYS HAVE ADVISED ME THAT PLAINTIFF'S ATTORNEYS REFUSE TO SETTLE KNOWING THEY WILL BE RACKING UP ATTORNEYS' FEES IF THEY CONTINUE TO LITIGATE THE CASE. WHICHEVER OF THESE VIEWS IS CORRECT, IF EITHER IS, THE SETTLEMENT PROVISION I HAVE SUGGESTED WOULD, IN MY OPINION, BE BENEFICIAL TO BOTH PARTIES. THE PROVISION WOULD PROVIDE GREAT INCENTIVE TO THE DEFENDANTS TO OFFER REASONABLE SETTLEMENTS TO THE PLAINTIFFS, RESULTING IN A QUICK AND FAIR RESOLUTION OF THE DISPUTE TO THE BENEFIT OF THE PLAINTIFF AND RESULTING IN A REDUCTION OF THE TERRIBLE CONJESTION THAT NOW EXISTS IN OUR COURTS. STATE AND LOCAL GOVERNMENTS WOULD KNOW THAT IF THEY OFFERED A REASONABLE SETTLEMENT THEY COULD PROTECT THEMSELVES AGAINST LARGE, AND POSSIBLY CRIPPLING, FEE JUDGMENTS AND COULD ALSO PROTECT THEMSELVES AGAINST ATTORNEYS WHO WOULD TRY TO RUN UP THE FEES.

THE LAST PROVISION I WILL DISCUSS HERE CONCERNS THE COMPUTATION OF THE FEE AWARD. FOR THE PURPOSES OF THE FEES ACT TO BE FULFILLED, IT IS VITAL THAT THE PLAINTIFF'S ATTORNEY BE ABLE TO ANTICIPATE ADEQUATE COMPENSATION IF HE TAKES THE CASE AND WINS. AN ATTORNEY TAKING THESE

CASES SHOULD BE COMPENSATED AT HIS NORMAL HOURLY RATE. I AM ALSO PROPOSING THAT THE HOURLY RATE THAT THE ATTORNEY CAN CHARGE BE LIMITED TO THE MARKET RATE FOR THE PARTICULAR AREA SO THAT, FOR EXAMPLE, A $150 AN HOUR RATE FOR A WASHINGTON, D.C. LAW FIRM WOULD NOT BE CHARGED AGAINST THE PUBLIC TREASURY OF A SMALLER COMMUNITY WHERE COMPETENT COUNSEL COULD BE OBTAINED FOR $50 AN HOUR. I AM ALSO PROPOSING THAT THE AWARDING OF BONUSES OR MULTIPLIERS IN ADDITION TO THE ATTORNEY'S REGULAR HOURLY RATE, A RATE WHICH EVERYONE EXCEPT LAWYERS WOULD AGREE WAS MORE THAN ADEQUATE, BE ELIMINATED. RECEIVING COMPENSATION AT THE ATTORNEY'S REGULAR HOURLY RATE SHOULD PROVIDE ADEQUATE INCENTIVE TO TAKE THESE CASES, AND THE USE OF BONUSES RESULTS IN INCENTIVES TO TAKE EVEN HIGHLY QUESTIONABLE OR FRIVILOUS SUITS IN THE HOPE OF RECOVERING A HUGE, WINDFALL FEE AWARD. SINCE COURTS NOW USUALLY AWARD BONUSES BECAUSE OF THE CONTINGENT NATURE OF THE CASE, THE AWARDING OF BONUSES ALSO RESULTS IN THE ANOMALOUS SITUATION WHERE A SMALL FEE AWARD IS GIVEN FOR A OBVIOUS, EGREGIOUS VIOLATION OF A PERSON'S CIVIL RIGHTS, BUT A HUGE FEE MAY BE AWARDED IN SITUATIONS WHERE IT WAS NOT AT ALL CLEAR THAT THE STATE OR LOCAL GOVERNMENT EVEN VIOLATED ANYONE'S CIVIL RIGHTS. I AM AWARE THAT MULTIPLIERS, RESULTING IN INCREDIBLE FEE AWARDS, ARE GIVEN IN COMPLEX ANTITRUST SUITS, FOR EXAMPLE, BUT SECTION 1988 CAN BE DISTINGUISHED BECAUSE THE FEES ARE AWARDED FROM THE PUBLIC TREASURY. WHETHER OR NOT MULTIPLIERS ARE JUSTIFIED IN ANTITRUST SUITS WHERE THE ATTORNEYS ARE PROBABLY MAKING WELL OVER $100 AN HOUR ALREADY IS NOT FOR US TO DECIDE HERE.

WHILE SOME OF THE LANGUAGE OF THE PROPOSED AMENDMENTS IS ADMITTEDLY VAGUE, IT SHOULD BE REMEMBERED THAT THE LANGUAGE OF SECTION 1988 PROVIDES VIRTUALLY NO DIRECTION ON THE ACTUAL AWARDING OF ATTORNEYS' FEES; LIKEWISE, ANY AMENDMENTS TO SECTION 1988 WILL REQUIRE A VERY CAREFUL LEGISLATIVE HISTORY. I PLAN TO CAREFULLY REVIEW TODAY'S TESTIMONY TO DETERMINE WHETHER CLARIFICATIONS ARE NEEDED IN THE PROPOSED AMENDMENTS, AND, INDEED, WHETHER ALL THE PROVISIONS ARE NECESSARY AT THIS TIME. I SHOULD ALSO POINT OUT THAT IT IS VERY POSSIBLE THAT I MAY CONCLUDE THAT THE PROPOSED AMENDMENTS DO NOT GO FAR ENOUGH, AS HAS BEEN SUGGESTED TO ME BY SEVERAL STATE AND LOCAL GOVERNMENT GROUPS.

FINALLY, IN MY OPINION, WE WILL BE DOING OURSELVES A GREAT DISSERVICE IF WE FRAME THIS ISSUE IN TERMS OF BEING EITHER FOR OR AGAINST CIVIL RIGHTS. CLEARLY, IT IS OF UTMOST IMPORTANCE THAT INDIVIDUALS HAVE A PRACTICAL REMEDY FOR VIOLATIONS OF THEIR CIVIL RIGHTS. IF WE WERE TO PAY ATTORNEYS INCREDIBLE AMOUNTS OF MONEY TO BRING CIVIL RIGHTS CASES, WE WOULD INSURE THAT EVERY CONCEIVABLE CIVIL RIGHTS COMPLAINT, AND PROBABLY A LOT THAT CAN'T BE CONCEIVED, WOULD BE BROUGHT. BUT SUCH A COURSE WOULD BE ALSO CLEARLY NOT IN THE BEST INTEREST OF THE TAXPAYERS WHO FUND THESE FEE AWARDS AND WOULD BE VERY DETRIMENTAL TO THE ABILITY OF STATE AND LOCAL GOVERNMENTS TO SERVE THE PUBLIC. IT IS MY VIEW THAT CHANGES CAN BE MADE IN THE FEES ACT WHICH WILL REDUCE THE PRESENT BURDEN WHILE STILL PROVIDING POOR PEOPLE WITH THE OPPORTUNITY TO ATTRACT COMPETENT COUNSEL TO REMEDY VIOLATIONS OF THEIR CONSTITUTIONAL RIGHTS.

MY OPENING STATEMENT THIS AFTERNOON WAS MUCH LONGER THAN IS MY USUAL PRACTICE. I DID THIS BECAUSE OF THE CRITICAL AND SENSITIVE NATURE OF THIS ISSUE AND BECAUSE I WANTED TO MAKE MY POSITION CLEAR. I APOLOGIZE THAT I WILL NOT BE ABLE TO STAY AND HEAR THE TESTIMONY, BUT SENATOR DECONCINI WILL BE HERE AND I WOULD LIKE TO THANK HIM FOR AGREEING TO CHAIR THIS IMPORTANT HEARING. I ALSO WANT TO THANK THE FINE GROUP OF WITNESSES WE WILL HEAR FROM TODAY. I LOOK FORWARD TO REVIEWING YOUR TESTIMONY LATER.

II

97TH CONGRESS
1ST SESSION

S. 585

To provide a special defense to the liability of political subdivisions of States under section 1979 of the Revised Statutes (42 U.S.C. 1983) relating to civil actions for the deprivation of rights.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 26 (legislative day, FEBRUARY 16), 1981

Mr. HATCH introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To provide a special defense to the liability of political subdivisions of States under section 1979 of the Revised Statutes (42 U.S.C. 1983) relating to civil actions for the deprivation of rights.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1979 of the Revised Statutes (42 U.S.C. 1983) is amended by inserting "(a)" before "Every" and by adding at the end thereof the following new subsection:

"(b) No civil action may be brought against a political subdivision of a State under this section if the political subdivision acted in good faith with a reasonable belief that the actions of the political subdivision were not in violation of any rights, privileges, or immunities secured by the Constitution or by laws providing for equal rights of citizens or persons.".

AMENDMENT NO. ____________ Ex. ______ Calendar No. ______

Purpose: ____________

IN THE SENATE OF THE UNITED STATES— ______ Cong., ______ Sess.

S. 585

H.R. ____________ (or Treaty ____________)
SHORT TITLE

(title) ____________

( ) Referred to the Committee on ____________
and ordered to be printed

( ) Ordered to lie on the table and to be printed

INTENDED to be proposed by Senator Orrin Hatch

Viz:

On page 1, strike out lines 6 and 7.

On page 2, strike out lines 1 through 5, and insert in lieu thereof the following:

"(b) In any action brought under this section, damages shall not be awarded against any government entity if the court finds that the officials thereof were acting in good faith."

Sec. 2. The Revised Statutes are amended by adding after section 722 (42 U.S.C. 1988) the following new section:

"LIMITATIONS ON AWARDS OF ATTORNEY'S FEES AND OTHER COSTS

"Sec. 722A. (a) Attorney's fees shall be awarded to the prevailing plaintiff in any action brought pursuant to section 722 (42 U.S.C. 1988) unless special circumstances would render such an award unjust. Attorney's fees shall be awarded to the prevailing defendant if the court finds that the plaintiff's claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so, even though there was no subjective bad faith.

"(b) Where a party has prevailed by virtue of a final judgment entered by the court on a pendent claim not covered under section 722 (42 U.S.C. 1988) but which is joined under the Federal Rules of Civil Procedure to a claim that is under such section, the court may only award attorney's fees if it finds that the preponderant reason for such joinder was not to recover attorney's fees.

"(c) No fee shall be awarded under section 722 of the Revised Statutes (42 U.S.C. 1988) as compensation for that part of litigation subsequent to a declined offer of settlement when such offer was as substantially favorable to the prevailing party as the relief ultimately awarded by the court.

"(d) No attorney's fees may be awarded under section 722 of the Revised Statutes (42 U.S.C. 1988) where the court finds the claims to be moot due to a change in government policy unless the preponderant reason for such change was the pendency of the litigation.

"(e) The amount of fees awarded under section 722 of the Revised Statutes (42 U.S.C. 1988) shall be based upon services reasonably performed of the kind and quality furnished, except that no award shall be higher than the prevailing market rate for the particular area. No awards based on contingency factors or multipliers may be made by the court in any award under section 722 of the Revised Statutes (42 U.S.C. 1988).

"(f) A party seeking an award of fees and other expenses under section 722 of the Revised Statutes (42 U.S.C. 1988) shall, within 30 days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this section. The application shall state the amount of fees and other expenses sought, including an itemized statement from any attorney or expert witness representing or appearing on behalf of the party, stating the actual time expended, the precise nature of the work done during each increment of time expended, and the rate at which fees and other expenses were computed".

Senator **Hatch**. Those of you who would like to read the statement can obtain copies of it.

At this point, I will turn to Senator DeConcini. I would like to turn these hearings over to you because of other commitments.

Senator **DeConcini**. I understand, Mr. Chairman. I thank you much for holding these hearings.

Senator **Hatch**. Could I add one other thing? I want to personally thank you for requesting the holding of these hearings and, of course, for your good interest in what has gone on in this committee and your participation in it. It has meant a lot to me, as committee chairman over this last year and so many months. It is just a great privilege to work with you. I appreciate it.

OPENING STATEMENT OF HON. DENNIS DeCONCINI, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator **DeConcini**. Thank you, Mr. Chairman. I have had a chance to read your statement. I want to particularly tell you that I think your staff has done an outstanding job, Mr. Ormsby and the rest of your staff.

I am pleased that you have gone into the detail that you have. I know you have got a few other committees on the agenda today and in the next weeks. I appreciate the opportunity and welcome the chance to hold these hearings in behalf of the committee.

While it is true that at previous hearings during the Congress there was much discussion of the awarding of attorney's fees, there were no specific proposals before us. Now that we have these proposals before us, it was my opinion we should hold one more day of hearings to elicit suggestions and comments from interested parties. I believe that we have excellent panels today. The first panel will consist of representatives from plaintiffs' groups and plaintiffs' attorneys. The second panel will be representatives from State and local government who are the defendants under 1983.

We regret that we will miss the presence of Mr. Richard Lawrence, who is staff counsel for the American Civil Liberties Union. Unfortunately, he had a little accident skiing, I understand and will not be with us. I am sure that Mr. Bradley will fill in quite ably.

Do you want to make a statement, Senator Kasten?

Senator **Kasten**. I wanted to introduce the gentleman from Milwaukee, but they are taking a picture of him right now in the hall, and they want me to be in the picture. I will get him and we will come back in.

Senator **DeConcini**. We will hold it up for you.

I hope that today's hearings will bring us closer to an understanding of the problem regarding attorney's fees. I will be glad to yield to my good friend from Wisconsin, Senator Kasten.

STATEMENT OF HON. BOB KASTEN, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator **Kasten**. Mr. Chairman, I appreciate the chance to briefly come here before your committee to introduce to you today Mr. James B. Brennan. Mr. Brennan is city attorney in Milwaukee, Wis. He is also the current president of the National Institute of Municipal Law Officers.

In his capacity as president of that distinguished organization, he comes before your committee today representing the legal concerns of more than 1,600 municipalities from across the entire Nation.

Mr. Chairman, I have always believed in the importance of local and Federal officials working together in the best interests of our constituencies. In light of the President's program of New Federalism, this working relationship will be ever more important in the months ahead. In this respect, since taking this job, I have tried to work closely with Mayor Maier and other people in the city of Milwaukee and also people from various State and local governments throughout Wisconsin.

Mr. Chairman, I am pleased to have this opportunity to introduce to you Mr. Jim Brennan. I know that the committee will be interested in his testimony. I am also aware of the fact that his time for testifying is in the next panel, but I wanted a chance to introduce him to you and the members of the committee because I find myself having to go to another meeting.

I thank you for this opportunity to introduce Jim Brennan. I am sure that you will benefit from his testimony.

Senator DECONCINI. Thank you, Senator Kasten. We are glad to have you here. We appreciate the introduction of Mr. Brennan. Indeed we will look forward to hearing from him in just a few minutes after we get to the second panel.

Senator KASTEN. We thank you very much.

Senator DECONCINI. We will proceed directly now to the first panel, which will be Father Drinan, former Congressman who distinguished himself for many years here; Mr. Bradley of the American Civil Liberties Union; Ms. Hernandez, the Mexican American League defense and education fund; and Mr. Farrington, the NAACP legal defense fund.

We will first hear from Mr. Bradley. If you have a lengthy statement, ladies and gentlemen, if you would submit them to the record so we can be sure to get some questions on the record which I have and some discussion. If you can summarize, we would appreciate it. Mr. Bradley?

Mr. BRADLEY. Thank you, Senator. I do have a prepared statement. I believe it has been delivered to the staff.

Senator DECONCINI. We will put it in the record.

STATEMENTS OF A PANEL CONSISTING OF NEIL BRADLEY, THE AMERICAN CIVIL LIBERTIES UNION; ANTONIA HERNANDEZ, ASSOCIATE COUNSEL, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND; FLETCHER FARRINGTON, ESQ.; AND ROBERT F. DRINAN, FORMER U.S. CONGRESSMAN FROM THE STATE OF MASSACHUSETTS

Mr. BRADLEY. Thank you for the opportunity to appear here today. I am appearing on behalf of the American Civil Liberties Union.

I would first like to say that, while the ACLU has an institutional interest in the recovery of fees, the ACLU has been around for 60 years, and it will survive whether or not this act is in any way altered. Our primary concern is that the purpose of the Fees Act was to get private attorneys involved in the delivery of services in civil rights cases. After 6 years of experience under the act, I do not think there is anywhere near the amount of attorneys available to handle civil rights cases.

I speak from day-to-day contact. I get constant calls from potential clients. I deal with the civil rights law. My office covers about a six- or seven-State area in the Old Confederacy. I know most of the lawyers who handle civil rights cases in those States. We could use a lot more lawyers able and willing to take on these cases.

I am concerned, first of all, that there is even a proposed amendment that speaks of limitations of attorney's fees of the Civil Rights Awards Act. We have had 6 years of experience, as I said, and we do not know what the record is, really. From my personal experience, I know that a lot more suits could be brought if there were attorneys found.

In the record here, one of the attorneys general mentions that in 1976 there were 15 civil rights lawsuits brought in his State, and now the number has expanded to over 100. Just the idea that in 1976 only 15 civil rights lawsuits were brought in one State is very striking to me. Either that State has a wonderful record or there just are not any lawyers out there willing to do these cases.

We are also concerned that civil rights is singled out in this legislation. There are approximately 100 fee-shifting statutes adopted by Congress. We are concerned that this area is singled out.

I would urge that, if anything is done in this area, that a good record be built. We have the Administrative Office of U.S. Courts, which keeps detailed statistical records. If they do not have the records now, surveys could be run to find out how many lawsuits are filed, exactly what type they are, what claims there are, what kind of fees are claimed, what kinds of fees are awarded, what kind of fees are denied. The impressions of various witnesses, including myself, just does not give a full record. If that kind of survey were done, maybe we could see that something needs to be done with this act; but I do not think there exists that need now.

SHIFT IN STANDARD FOR DEFENDANTS' FEES

Turning to the provisions of the amendment subsection (a) inserting the frivolous, unreasonable, or groundless language for recovering defendant's fees, I question the need for that. When defendants are recovering fees, they are really de minimis to the defendants. If a lawsuit is frivolous, I would think it would be dismissed in the early stages without involving very much time or effort, if it really were frivolous.

The few hundred dollars that the State might recover means nothing to them, but it is a tremendous deterrent to civil rights plaintiffs. I speak from experience because in the circuit in which I practice, for a while under a case decided in the fifth circuit, the standard was defendants could equally recover fees. That opinion was quickly reversed, but I know during those months it was in effect plaintiffs were very wary. I had to advise them to be very wary. I could not guarantee them that fees would not be awarded against them. Even if they do not have much property or just a small equity in their house, it can be personally disastrous, just a few hundred dollars or a thousand dollars. It means nothing, however, to the Government, virtually nothing.

I really question why this is sought by the Government.

FEE RECOVERY ON PENDENT CLAIMS

Section (b), which is the section talking about you can only recover fees if you recovered on a State claim and you really did not join a Federal issue just to be able to recover fees, I do not really think that will have much effect one way or the other. The lawyers have the duty to bring up all issues that their clients can raise. With the law of res judicata, you just cannot avoid raising those issues. It will be very difficult to establish that I or any other civil rights lawyer joined a Federal claim just for this reason. It is just almost impossible.

SETTLEMENT OFFERS

The next section talks about settlement and says after an offer is made and if you turn that down and recover about the same amount, you cannot recover fees subsequent to that offer. I really think that does not show an appreciation of the difficulties of trial litigation. The first thing that is going to happen is the defendant is going to offer $1, and then they are going to offer $10 and $100 and $1,000 and $2,000, seriatum, up to the point where they think is reasonable and whether or not there is any intention, you know, any possibility of settlement. That is what I would do as a defense lawyer: make that settlement offer just to defeat the fee claim later on, because that might be what you end up with.

This section just overlooks that there can be any number of reasons why settlements happen. The case law can change. Statutes can change. For example, the Supreme Court's decision in *Carey* versus *Piphus,* 435 U.S. 247 (1978), prior to that nominal damages were considered to be up to $1,000. All of a sudden, the Supreme Court just said it cannot be more than $1. Well, if $100 had been offered during a trial in the lawsuit, that very surprising Supreme Court decision would bring this kind of amendment into play and defeat attorney's fees.

Ofttimes, you need a lot of discovery in cases to find out whether or not you really have a solid claim. If, as I said, an offer is going to be made by defendants on the first day a lawsuit is filed, neither side is yet able to evaluate settlement. You do not know how sound your case is until you have been in discovery. And that discovery is what eats up time and expense.

Also, problems could arise when the client refuses to take the attorney's advice. You cannot force them to settle. Ofttimes, you cannot withdraw from the case; it would be unfair to the client or the court might not let you. The client has the final say. No matter how good or bad your advice is, the client has to accept it or reject it.

Any other number of things can affect settlement. You can have witnesses who just do not testify the way they had testified previously. It is not a question of perjury. It is just your case falls out a little bit different, and you can be very surprised. Maybe it is the difference between winning and losing. There are just too many variables that come down the line from an initial offer of settlement to make this proposed amendment fair.

The other problem, which I have gone into in detail in my written statement, is that this section puts a real wedge between the attorney and the client. The attorney now is not allowed ethically to discuss fees at the time of settlement under most court decisions. What the statute does is put a burden on the plaintiff's attorney now to suffer the economic burden if he makes an error in judgment or if the client makes an error in judgment. That is a real problem. More and more defendants are making such offers. They tie settlement to attorney's fees.

MOOTNESS DUE TO CHANGE IN GOVERNMENT POLICY

The next subsection deals with mootness, that you cannot recover fees if a change in Government policy results in mootness and that is the preponderant reason. I have two main objections. One is it singles out Government defendants changing policy for treatment different under the law. And it leaves other people under 1988 unaffected. There are private individuals who can be defendants under 1981 or 1982. There can be private individuals who are defendants under 1983 if they are acting under color of law. Here this seeks to immunize governments but not other people.

I do not see the equity in saying the Government should be immune when other individuals are not in this kind of thing.

The other problem is legislating the phrase preponderant reason. Legislating an evidentiary burden is, to my knowledge, unique in legislation. Congress just does not legislate evidentiary burdens. It does not say you have to show in a civil case something by a clear preponderance or by preponderance. It is a very unusual kind of provision. I would hope you would receive a great deal of study before evidentiary burdens are put into a statute.

PREVAILING MARKET RATE

The next subsection, (e), talks about fees can only be recovered at the prevailing market rate. The first thing I want to talk about there is that for a lot of these cases there is no such thing as a prevailing market rate. In my area, which is predominantly voting law, in 1980, 160 cases were brought in the country in Federal court regarding voting rights. Some of those were by the Justice Department. I know of one that was brought by a fee-paying client. There might be others; I cannot say that there are no others. But it is very rare that people can lay out money to bring these kinds of lawsuits. A prevailing market rate just does not exist.

If the amendment refers to a geographical area, it really injures those clients in rural areas. You can usually find lawyers to bring lawsuits in the large cities, but it is the rural areas where the problem is. It is also the rural areas where there is a depressed fee scale.

An example I want to give here is that last June we handled a lawsuit out of Edgefield County, S.C., to allow a demonstration at Strom Thurmond High School. We had to go to Federal court to get the school board to allow our clients to use that property. The county attorney, after we won that lawsuit—not the county attorney, but the county bar president submitted an affidavit as did other lawyers in that county. Charles Coleman, who is the county bar president, said he knew that there were nine lawyers in that county. He knew the predominant rate; that was $45 an hour for in court work and $35 for out-of-court work. That lawsuit had to be handled by people from Columbia and Atlanta. There was no lawyer in that county who was willing to take that lawsuit.

The court award in that case was for one lawyer was $25 in out-of-court work and $50 for in-court which was just 1 or 2 hours. And a lawyer with 16 years of experience in civil rights work was awarded $30 an hour for out-of-court and $60 for in-court. That is not even the prevailing market rate, obviously, from what the defendants said.

I just give that as one example. People cannot afford to travel distances and be paid at a depressed scale just because the local area happens to be that way. I do not think that was the intent of the 1976 act. I think, clearly, Congress then intended that the complexity is what controls, not the geography and not the narrow issue in that case, whether it is voting rights or housing or anything else.

CONTINGENCY FACTOR AND MULTIPLIERS

The other part of that subsection bars multipliers and contingency fees. The point here is that you cannot set a reasonable fee if you do not consider contingency. When a lawyer is paid only in the event of success, contingency is one of the factors you have to look at.

Contingent fee arrangements started around the turn of the century out of the industrial revolution. They were limited then by the bar associations. The bar associations wanted to stop lawyers from representing injured workers. I see a parallel here. If a lawyer has to spend a great deal of time over a number of years, the legislative history and the courts have been uniform and the bar is uniform—it is not civil rights plaintiffs' lawyers, it is the American Bar Association that says contingency is a factor that must be considered. It is proper to be considered.

FEE APPLICATION PROCEDURE AND FINAL JUDGMENT

The last section of the statute sets essentially a time limit for bringing fee applications. I do not have any particular problem with that. I do not see it as necessary.

I do have some problems with the term final judgment both in this section and in subsection (b). One of the problems is in civil rights lawsuits you can win them but a judgment is not entered. It may not be entered for a long time. If you are dealing with equitable relief, once the legal issue is decided, you then have to hammer out the form of relief, who is going to do what, and when. It often takes a long time.

We had a case recently in which we wanted to appeal the opinion. The 30 days was running, so we filed an appeal from the opinion. We kept asking the court for a judgment. Finally, the word came back: we do not know exactly how to draft a judgment, would you draft one for us. We had to do that and submit it to defendants. The judge finally signed it. But, if the purpose of this amendment is to speed up attorney's fees applications, I really wanted to point out that in some cases it is going to be delayed.

FEE AWARDS AS A DETERRENT TO DEFENDANTS PROTRACTING LITIGATION

The last point I would make overall is that my experience has been, especially prior to the 1976 act, defendants will litigate rights to the end. As long as all they are paying for is their own lawyers and there is no risk of any money being paid to the other side, they will litigate forever. They will be just as obstructionist as they can get away with. I am not saying that is uniform, but I am saying that I went through a number of experiences that way.

One thing defendants really despise, apparently, is having to pay money to the other side's lawyers. It is an effective deterrent to dragging out litigation by the other side. It is slowly beginning to work. More and more lawyers on the defense side are becoming aware of the statute. Not all of them are aware of the statute. They are sometimes surprised when we have an attorney's fees claim in the complaint. But it really is an effective deterrent to get the main goal, and that is get the relief for your clients.

I do not know of any lawyer on the plaintiff side—I am not saying it never happened—I do not know of any lawyer who was accused of dragging out a lawsuit on the plaintiff side. The lawyer may say we are going to reject that settlement because we think we can get something better. But I do not know plaintiffs' lawyers that milk a lawsuit once they get a decent settlement offer. So, some of the previous testimony about how people drag things out on the plaintiff side just to run up a bill, I have not seen that problem. I have never heard of any bar members that I work with daily being accused of that.

I believe that wraps up my statement, sir.

Senator DECONCINI. Thank you very much, Mr. Bradley.

[The prepared statement of Mr. Bradley follows:]

PREPARED STATEMENT OF NEIL BRADLEY

My name is Neil Bradley. I welcome the opportunity to testify before this Committee on the amendments to S.585 concerning the Civil Rights Attorneys' Fees Awards Act of 1976, codified in 42 U.S.C. §1988. I appear on behalf of the American Civil Liberties Union. The ACLU is a membership organization of approximately 250,000 members whose purpose is to support the rights of individuals guaranteed by the Constitution. It has a particular interest in supporting individuals' efforts to enforce their rights, including their means and ability to seek judicial protection when that becomes necessary.

I am Associate Director and staff counsel of the Southern Regional Office of the ACLU Foundation, Inc., located in Atlanta, Georgia. This statement is co-authored by E. Richard Larson, National Staff Counsel of the ACLU. Mr. Larson is the author of many articles and of a recently published book on court-awarded attorney's fees.

The American Civil Liberties Union agrees with the 94th Congress. which enacted the Civil Rights Attorney's Fees Awards Act of 1976, that fee awards are essential to provide private individuals a meaningful opportunity to vindicate their civil and constitutional rights. The attorney's fees provisions of S.585, entitled "LIMITATIONS ON AWARDS OF ATTORNEY'S FEES AND OTHER COSTS," would have the effect of limiting the availability of court-awarded fees where rights had been vindicated through litigation. The apparent intent of S.585 is to deny individuals the opportunity to vindicate their civil and constitutional rights. The ACLU firmly opposes S.585.

This statement is divided into two parts. First, I shall address the findings of the 94th Congress which led to the enactment of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988 as amended (hereinafter the "Fees Act"], congressional findings which remain valid today to rebut legislative efforts to undermine or selectively repeal the Fees Act.

Second, I will address and analyze the specific provisions of S.585, all of which undermine or selectively repeal the Fees Act.

I. THE FINDINGS OF THE 94th CONGRESS

Legislation such as S.585, which undermines or selectively repeals the Fees Act, appears to be premised on the ground that the valuable rights secured by our civil rights laws and by our Constitution are not so valuable after all, that neither those laws nor our Constitution need to be adequately enforced. This premise, along with other purported premises, is directly contradicted by the findings of the 94th Congress, findings which accompanied enactment of the Fees Act:

> In several hearings held over a period of years, the Committee [on the Judiciary] has found that fee awards are essential if the Federal statutes to which [the Fees Act] applies are to be fully enforced.

S.Rep. No. 94-1011, 94th Cong., 2d Sess., 5 (1976) (emphasis added) [hereinafter "Senate Report"]; see also H.R.Rep. No. 94-1558, 94th Cong., 2d Sess. (1976) [hereinafter "House Report"].

This finding by the Senate Committee on the Judiciary did not occur in isolation. To the contrary, this finding is cumulative of the Senate Committee's repeated recognition that the viability of our civil rights laws depends upon private enforcement through litigation, and that fee awards are essential for individuals to obtain effective access to the courts:

> All of these civil rights laws [covered by the Fees Act] depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.

Senate Report at 2. In other words, the availability of court-awarded attorney's fees was viewed as essential to enable individuals "to be able to assert their civil rights," and as necessary to insure that "those who violate the Nation's fundamental laws are not [allowed] to proceed with impunity." Id.

The Senate Judiciary Committee also quoted with approval from two Supreme Court decisions which characterized fee awards as essential to obtaining enforcement of the law. See Senate Report at 3. In Hall v. Cole, 412 U.S. 1 (1973), a case involving private enforcement of the Landrum-Griffin Act, the Court left no doubt about the importance of fees to compel enforcement: "[N]ot to award fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose." 412 U.S. at 13 (brackets by the Court) (citation omitted). This same point was made with regard to Title II of the Civil Rights Act of 1964 in Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968): "If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the Federal courts."

Fees awards, in other words were found to be an essential prerequisite to enforcement of our laws. As the Senate Judiciary Committee concluded:

> [The Fees Act] does not change the statutory provisions regarding the protection of civil rights except as it provides the fee awards which are necessary if citizens are to be able to effectively secure compliance with these existing statutes. There are very few provisions in our Federal laws which are self-executing . . . . If the cost of private enforcement actions becomes too great, there will be no private enforcement. If our civil rights laws are not to become mere

> hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases.

Senate Report at 6. See also the House Report.

These express congressional findings which supported the enactment of the Fees Act in 1976 also underlie the enactment by Congress of similar fee-shifting statutes in such diverse areas as copyright infringement, 17 U.S.C. §505; securities violations, 15 U.S.C. §77k(e), §78i(e), §78r(a), §78eee(b); and antitrust violations, 15 U.S.C. §15c(a)(2), §15c(d)(2). In fact, recognizing that fee awards are necessary to obtain civil enforcement of the law, Congress has enacted nearly 100 fee-shifting statutes.

S.585 is not directed at the fee-shifting provisions of such laws as the Bankruptcy Act, the Clayton Act, the Copyright Act, the Perishable Agricultural Commodities Act, or the Securities Exchange Act. Instead, S.585 is directed only at the Civil Rights Attorney's Fees Awards Act, a statute which authorizes court-awarded attorney's fees in litigation brought under, inter alia, 42 U.S.C. §1983. And it is primarily through §1983 that the civil and constitutional rights of the people of the United States are enforced.

S.585's proposed limitations on the availability of fee awards under the Fees Act would discourage private lawyers from representing civil rights plaintiffs and would thereby make it even more difficult for persons whose rights have been violated to vindicate their rights. For thousands upon thousands of people, the rights guaranteed by our Constitution and by our civil rights laws would -- in the words of the Senate Judiciary Committee -- become mere hollow pronouncements which the average citizen cannot enforce.

II. THE ATTORNEY'S FEES PROVISIONS OF S.585

Section 2 of S.585 is entitled "LIMITATIONS ON AWARDS OF ATTORNEY'S FEES AND OTHER COSTS." It would amend the Civil Rights Attorney's Fees Awards Act of 1976 [the "Fees Act"], 42 U.S.C. §1988, by adding thereto a new Section 722A, 42 U.S.C. §1988A, with subsections (a) through (f). Each of these subsections, with several minor exceptions, contradicts the express intent of the 94th Congress, and undercuts the legal standards which govern fee awards under the Fees Act.

A. PROPOSED SUBSECTION (a)

Proposed subsection (a) states: "Attorney's fees shall be awarded to the prevailing plaintiff in any action brought pursuant to section 722 (42 U.S.C. 1988) unless special circumstances would render such an award unjust. Attorney's fees shall be awarded to the prevailing defendant if the court finds that the plaintiff's claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so, even though there was no subjective bad faith.

SUMMARY

Under current law, there is a dual standard of entitlement to fees. Although the Fees Act authorizes fee awards to prevailing parties, both the legislative history and judicial decisions created a dual standard under which plaintiffs are ordinarily entitled to fees whereas defendants are entitled to fees only if the plaintiff's case was brought in bad faith.

Subsection (a) of S.585 purports to codify this dual standard. It does so for prevailing plaintiffs. But it makes it easier for prevailing defendants to win fee awards.

ANALYSIS

In Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968), the Supreme Court held that a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render an award unjust." This standard was expressly incorporated by Congress into the Fees Act. See Senate Report at 3-4; House Report at 2, 6. It has been uniformly applied under the Fees Act by the lower federal courts and by the Supreme Court. See, e.g., Maher v. Gagne, 448 U.S. 122 (1980).

Subsection (a) of S.585 makes no change in the current standard under which prevailing plaintiffs are entitled to fees. Subsection (a) of S.585, however, does relax the standard under which prevailing defendants can recover fees.

The legislative history of the Fees Act authorizes fees for a prevailing defendant only where the plaintiff litigated in bad faith. The reason for this stringent bad faith standard was aptly summarized in the Senate Report at 5: aggrieved individuals "should not be deterred from bringing good faith actions to vindicate the fundamental rights here involved by the prospect of having to pay their opponent's counsel fees should they lose." On this premise, the Senate Judiciary Committee concluded that defendants' fees are authorized only against a plaintiff "shown to have litigated in 'bad faith.'" Senate Report at 5. The House Judiciary Committee agreed: "Thus, if the action is not brought in bad faith, such fees should not be allowed." House Report at 7. This bad faith standard was reiterated on the floor of the House, see, e.g., 122 Cong. Rec. H. 12162 (daily ed., Oct. 1, 1976) (Rep. Railsback); id. at H. 12165 (Rep. Seiberling). Often relying on this legislative history, the courts have applied this bad faith standard under the Fees Act. See, e.g., Keyes v. Lauga, 635 F.2d 330 (5th Cir. 1981); Hughes v. Repko, 578 F.2d 483 (3d Cir. 1978); Isaacs v. Temple University, 467 F.Supp. 67 (E.D.Pa. 1979).

The bad faith standard under the Fees Act is not applicable, however, under all other fee-shifting statutes. Under Title VII of the Civil Rights Act of 1964, a statute without the Fees

Act's legislative history, the Supreme Court rejected the bad faith standard and held instead that fees could be awarded to a prevailing defendant where a court finds that the plaintiff's claim "was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978). The Supreme Court has also held, without addressing the legislative history of the Fees Act, that this is the minimum standard to be applied under the Fees Act. Hughes v. Rowe, 449 U.S. 5 (1980).

Subsection (a) of S.585 applies the defendants' standard articulated in Christiansburg to the Fees Act. By doing so, subsection (a) of S.585 negates the congressional intent articulated in 1976 to award fees to defendants only where plaintiffs litigated in bad faith. Subsection (a) of S.585, in other words, makes it easier for prevailing defendants to win fee awards. This will have the precise deterrent effect on potential plaintiffs that the 94th Congress specifically sought to avoid.

* * *

B. PROPOSED SUBSECTION (b)

Proposed subsection (b) states: "Where a party has prevailed by virtue of a final judgment entered by the court on a pendent claim not covered under section 722 (42 U.S.C. 1988) but which is joined under the Federal Rules of Civil Procedure to a claim that is under such section, the court may only award attorney's fees if it finds that the preponderant reason for such joinder was not to recover attorney's fees."

SUMMARY

Where a plaintiff prevails on a statutory claim which is pendent to a constitutional claim not ruled upon, the plaintiff currently is entitled under the Fees Act to an award of fees.

Subsection (b) of S.585, for which there is no analog under current law, requires a court in this situation to determine that the preponderant reason for joinder of the statutory claim was not to recover fees.

ANALYSIS

Prior to enactment of the Fees Act, judicial policy required a court to avoid constitutional rulings by first addressing statutory claims, including pendent statutory claims, which might dispose of the case in plaintiffs' favor. In enacting the Fees Act, Congress recognized this judicial policy and directed fee recovery for plaintiffs who won on pendent claims not expressly covered by the Fees Act. The House Report at 4 n. 7, for example provided:

> In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive. Hagans v. Lavine, 415 U.S. 528 (1974). In such cases, if the claim for which fees may be awarded meets the 'substantiality' test, see Hagans v. Lavine, supra; United Mine Workers v. Gibbs, 383 U.S. 715 (1966), attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a 'common nucleus of operative fact.' United Mine Workers v. Gibbs, supra at 725.

The courts have uniformly adhered to this rule, and thus have awarded fees to plaintiffs who prevailed on pendent statutory claims. See, e.g., Oldham v. Ehrlich, 617 F.2d 163 (8th Cir. 1980); McManama v. Lukhard, 616 F.2d 727 (4th Cir. 1980); Holley v. Lavine, 605 F.2d 638 (2d Cir. 1979); Lund v. Affleck, 587 F.2d 75 (1st Cir. 1978).

Subsection (b) of S.585 recognizes the pendent claim basis for awarding fees, but seeks to burden fee applicants and the courts by requiring courts -- as a prerequisite to awarding fees -- to determine that the preponderant reason for joining the non-fee claim was not to recover fees. Requiring such a finding is, in a sense, a meaningless burden since the reason for the joinder almost always will have been to represent one's clients properly, to win.

* * *

C. PROPOSED SUBSECTION (c)

Proposed subsection (c) states: "No fee shall be awarded under section 722 of the Revised Statutes (42 U.S.C. 1988) as compensation for that part of litigation subsequent to a declined offer of settlement when such offer was as substantially favorable to the prevailing party as the relief ultimately awarded by the court."

SUMMARY

Under current law a prevailing plaintiff is entitled to an award of fees regardless of whether a settlement offer might have been earlier rejected. Current law also recognizes that it is ethically improper to inject fee considerations into the resolution of litigation on the merits.

Subsection (c) of S.585, elevates hindsight logic and the uncertainties of litigation to a level nonexistent in actual practice. More perniciously, Subsection (c) of S.585 improperly and unethically injects fee considerations into negotiations on the merits.

ANALYSIS

The legislative history of the Fees Act, through the House Report at 7 and the Senate Report at 5, unmistakably recognizes that fees are to be awarded where a plaintiff prevails through settlement. Nowhere in the legislative history is there a suggestion that fees should be denied to a prevailing plaintiff where a settlement offer had previously been rejected. Consistent with this legislative history, the Supreme Court has recognized that there is an entitlement to fees where a plaintiff has prevailed through settlement. Maher v. Gagne, 448 U.S. 122 (1980). Similarly, the courts have uniformly refused to deny fees where a settlement offer which turns out to be similar to the relief ultimately obtained had been declined by the plaintiff. See, e.g., Coop v. South Bend, 635 F.2d 652 (7th Cir. 1980); Mid-Hudson Legal Services v. G & U, Inc., 465 F.Supp. 261 (S.D.N.Y. 1978). These standards essentially insure that reasonable offers will be accepted and that offers which at the time appear unreasonable need not be accepted.

Subsection (c) of S. 585 significantly alters these standards by penalizing counsel for not accepting an offer on the merits which later turns out to have been as substantially favorable as the relief ultimately awarded. This proposal, which encourages defendants to make early settlement offers at virtually no risk, fails to recognize that most cases are settled after extensive discovery into the facts, or as a result of intervening changes in the law. The proposal, in other words, places the burdens of the uncertainties of litigation wholly on plaintiffs' counsel whose only compensation may be hoped-for court awarded fees. As such, the proposal also is unethical.

"Everyone familiar with civil rights litigation knows that a plaintiff in such suits rarely pays attorney's fees," and that a motion for fees, "although made in the name of the plaintiff, is really one by the attorney. This interest in the fee makes it improper for the lawyer in a civil rights suit to inject the question of attorney's fees into the balance of settlement discussions." Regalado v. Johnson, 79 F.R.D. 447, 451 (N.D.Ill.1978). This ethical conflict, in fact, has increasingly led the courts to discourage if not to bar simultaneous consideration of fees and of settlement on the merits.

See, e.g., Mendoza v. United States, 623 F.2d 1338 (9th Cir. 1980); Prandini v. National Tea Co., 557 F.2d 1015 (3d Cir. 1977); see also, Opinion No. 80-94 of the Committee on Professional and Judicial Ethics of the New York City Bar Ass'n, 36 Record of the N.Y.C.B.A. 507 (1981); cf, Manual for Complex Litigation, 1.46, reprinted in 1, Pt. 2, J. Moore, Federal Practice, 1.46, at 74 (2d ed. 1981).

Subsection (c) of S.585 directly imposes this ethical conflict by injecting the possibility of fee denial into settlement negotiations on the merits. It thus is not only inconsistent with current ethical requirements but itself is unethical.

* * *

D. PROPOSED SUBSECTION (d)

Proposed subsection (d) states: "No attorney's fees may be awarded under section 722 of the Revised Statutes (42 U.S.C. §1988) where the court finds the claims to be moot due to a change in government policy unless the preponderant reason for such change was the pendency of the litigation.

SUMMARY

Under current law a plaintiff may be held to be a prevailing party and entitled to recover fees even if the claim has been mooted if the court finds that the suit was a catalyst for the change of policy which rendered the litigation moot. The legislative history of the Fee Act expressly approved this rule by citing Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970). See House Report at 7; Senate Report at 5. Since Parham, every other circuit has applied the catalyst standard.

Subsection (d) of S.585 modifies the catalyst standard in the limited area of mootness where government policy is the matter changed resulting in mootness. It does so by shifting the burden of proof to plaintiffs to demonstrate matters that are in the province of defendants, and by allowing the denial of fees by establishing other motivation for the change in policy.

ANALYSIS

The legislative history of the Fees Act and subsequent court decisions recognize that mootness does not automatically defeat a fee claim. When the issue of mootness arises, it is plaintiff's burden to show that he or she is the prevailing party under the meaning of the Fees Act, and one element of what must be shown is that the lawsuit was the catalyst for the change resulting in mootness. The courts have expressed this principle in various ways. E.g., the fee claimant must establish that his or her efforts "contributed in a significant way," Bonnes v. Long, 599 F.2d 1316, 1317 (4th Cir. 1979), to the change, or whether the remedial actions of defendants were "a consequence of the filing of the suit." Robinson v. Kimbrough, 652 F.2d 458, 464 (5th Cir. 1981). Fees, of course, are often denied under this standard so it cannot be said that it is a standard inherently favorable to claimants. E.g., Aho v. Clark, 608 F.2d 365 (9th Cir. 1979); Bly v. McLeod, 605 F.2d 134 (4th Cir. 1979).

Subsection (d) of S.585 significantly alters this standard by requiring plaintiffs to prove that the lawsuit was "the preponderant reason" for the change in government policy.

The first, though not the most important, objection to this language is that it is a statutory insertion of an evidentiary level of proof in a procedural statute. This is not only unwise but likely unprecedented. Congress has never before, to my knowledge, legislated evidentiary levels. It is particularly unwise to do so when the issue is the intent or the state of mind of the opposing party. If Congress wishes to legislate in this area, it would be far better to follow the processes used in developing the Federal Rules of Evidence, with input from the courts and the bar. Establishing the burden of proof by statute or by rule, e.g., Rule 301, Federal Rules of Evidence, is far different from legislating that that burden shall be met by "a preponderance of the evidence" or "clear and convincing evidence" or other standards.

The second objection to the language "the preponderant reason" is substantive. Obviously establishing that the pendency of the litigation was "a" reason, "an important" reason or fifty percent of the reasons is insufficient. That this language would operate to defeat virtually all fee claims under the mootness circumstance was shown by the Supreme Court's decision in Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265 (1977):

> Rarely can it be said that a legislative or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one.

Focusing on intentions of the defendants might make sense if attorneys' fees awards were designed to punish defendants. But the legislative history and the courts have been uniform in holding that is not the purpose. The purpose of fee awards is to encourage injured individuals to seek judicial relief. Given this policy, the court of appeals for the first circuit said it well:

> [I]t makes no difference whether plaintiff's suit yields favorable out of court results because a good faith defendant is brought to understand the illegality of his conduct and alters his behavior or because an unrepentant defendant grudgingly signs a consent decree to avoid continued litigation expenses in a lost cause. The key issue is the provocative role of the plaintiff's

> lawsuit, not the motivations of the defendant.
>
> Nadeau v. Helgemoe, 581 F.2d 275, 280 (1st Cir. 1978).

Third, the language shifts to plaintiffs not the burden of proving the pendency of the litigation was a contributing factor to the policy change, a burden they currently have, but the impossible burden of proving the calibration of various motivating factors of defendants' reasons for policy change. Evidentiary burdens are based on fairness. It is a fundamental rule that "where facts pleaded by one party lie peculiarly in the knowledge of the adversary, the latter has the burden of proving it." McCormick, Law of Evidence, §318, p. 675. Subsection (e) reverses this traditional rule. It would be more equitable to reverse the language, to hold that a court may decline to award a fee where it finds that the preponderant reason for the change in policy was other than the pendency of the litigation. This would be more in line with the Fees Act as currently applied, that fees are to be awarded unless special circumstances would render an award unjust.

The second overall defect of Subsection (d) is that it creates two standards depending upon whether or not the defendants are a government, and whether or not it was government policy that changed. It does not affect private defendants sued under 42 U.S.C. §§1981 and 1982 or those individuals sued under §1983 for acting under color of law.

Subsection (d) of S.585 alters law from the legislative history of the Fees Act which has been uniformly applied in all circuits. It does so only for the limited circumstance of a change in government policy causing mootness, for a limited set of defendants, but this circumstance is an often recurring one. The change would make it nearly impossible to recover fees when a change in government policy results in mootness.

E. PROPOSED SUBSECTION (e)

Proposed subsection (e) states: "The amount of fees awarded under section 722 of the Revised Statutes (42 U.S.C. §1988) shall be based upon services reasonably performed of the kind and quality furnished, except that no award shall be higher than the prevailing market rate for the particular area. No awards based on contingency factors or multipliers may be made by the court in any award under section 722 of the Revised Statutes (42 U.S.C. §1988).

SUMMARY

Under current law a prevailing plaintiff is entitled to an award of fees based upon the work done. The work must be reasonably expended on the matter for the representation of the client and the rates must be reasonable. Adjustments in the fees are made, up or down, under a variety of factors. The rates must be adequate "to enable litigants to obtain competent counsel worthy of a contest with the caliber of counsel available to their opposition and to fairly place the economical burden. . ." Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 719 (5th Cir. 1974). Senate Report 6, House Report 8.

Subsection (e), while codifying in different language §1988's "reasonable attorney's fees," goes on to limit what is reasonable to "the prevailing market rate for the particular area" and further, to prohibit "awards based on contingency factors or multipliers," thus drastically redefining "reasonable" to mean a fee less than reasonable, and in the process reversing the standards now adopted by nearly all the courts of appeals.

ANALYSIS

The Fees Act directs that only "a reasonable attorney's fee" may be allowed. The legislative history, Senate Report at 6, House Report at 8, approved the factors considered in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), as appropriate factors to evaluate to determine "fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys." Senate Report at 6. The court of appeals in Johnson did not write on an empty slate, for it said that the factors "are consistent with those recommended by the American Bar Association's Code of Professional Responsibility. . ." 488 F.2d at 719. Factors such as contingency are matters that are always considered in determining the reasonableness of fees when fees are paid only in the event of success.

There is no problem with Subsection (e)'s language that fees shall be based upon "services reasonably performed of the kind and quality furnished," except that the latter part of that phrase is either redundant or has no meaning. Fees must be "reasonable"--the word in the statute--and courts have of course required the work to be actually performed and necessary to adequately represent the client. Hours of work claimed are often reduced by courts, even when there is no doubt that the work was done, but never increased.

The law on calculation of fees in civil right cases has gone through a sifting and winnowing process over the past decade. Much time, effort and expense has gone into this development of case law. While there are disputes on fees and a few issues still are to be resolved, the basic law on the method of fee computation is well settled. The "lodestar" method, a three step process in which the basic fee is to be set by an hours times reasonable rates calculation, then increased, if merited, based upon contingency factors and then increased or decreased based on quality factors, has been approved if not required by all circuits. Furtado v. Bishop, 635 F.2d 915 (1st Cirl 1980): Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974); Lindy Brothers Builders, Inc. v American Radiator and Sanitary Corp., 487 F.2d 161 (3rd Cir. 1973); Anderson v. Morris, 658 F.2d 246 (4th Cir. 1981); Copper Liquor, Inc. v. Adolph Coors Co., 624 F.2d 575 (5th Cir. 1980); Northcross v. Board of Education of Memphis, 611 F.2d 624 (6th Cir. 1979); Muscare v. Quinn, 614 F.2d

577 (7th Cir. 1980); Cleverly v. Western Electric Co., 594 F.2d 638 (8th Cir. 1979); Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974); cf. Battle v. Anderson, 614 F.2d 251 (10th Cir. 1980); Copeland v. Marshall, 641 F.2d 880 (D.C.Cir. 1980).

Adjustment based on contingency are necessary because this is a fundamental element of what a reasonable fee is. The risk of losing is always a factor, in all areas of the law, in setting fees where fees are to be paid only in the event of success. "Reasonable fees" simply cannot be calculated without consideration of the risk factors.

The court of appeals for the fifth circuit expressed this in Jones v. Diamond, 636 F.2d 1364, 1382 (5th Cir. 1981)(en banc). Speaking of contingency the court said:

> This reflects the provisions of the ABA Code of Professional Responsibility, DR 2-106(B)(8), and the practice of the bar. Lawyers who are to be compensated only in the event of victory expect and are entitled to be paid more when successful than those who are assured of compensation regardless of result. This is neither less nor more appropriate in civil rights litigation than in personal injury cases. The standard of compensation must enable counsel to accept apparently just causes without awaiting sure winners.

Fees enhanced because of contingency are in no sense a bonus or a windfall. They have two obvious purposes--to compensate attorneys proportionately when they undertake a risk of recovery and to compensate for not being paid until the end of the case. The logic underlying enhancement is clear. When lawyers take contingent fee cases, they seek a fee structure such that they will be adequately compensated for all their work just as do lawyers who operate on a straight billing bases. The higher hourly rate in successful cases must be averaged with the cases they lose.

The following table illustrates two attorneys who each handle four cases requiring one hundred billing hours each. One bills his clients and is paid in all cases at $60/hour. The other handles contingent fee cases, and is successful, and thus paid, in three of the four cases. The latter's hourly contingent fee is one third higher, $80/hour.

Straight Billing	Contingent Fee
100 hours	100 hours
x 4 cases	x 4 cases
400 total hours	400 total hours
x $60	-100 hours for which no fee received
$24,000 fees received	300 hours
	x $80
	$24,000 fees received

Thus with a success rate of 75 percent, contingent fees must be one third higher to provide equal compensation with a straight billing attorney.

The above, of course, does not even allow for the burden of delayed payment, which in civil rights cases can run for ten years or more.

There is a more fundamental problem in civil rights contingent fee cases. In all contingent fee cases, the attorney must evaluate the risk factor, *i.e.*, the odds of recovering fees. In personal injury suits, a plaintiff's lawyer may make an informed judgment as to the likelihood of success. This judgment may be based on the thousands of previous similar cases, the well settled law, the appellate decisions, the attorney's own experience, etc. While not reduced to a science, it is a highly informed judgment.

The very opposite applies in most areas of civil rights law. There simply does not exist the volume of prior cases, decided under unchanging or slowly evolving legal principles as in tort law, on which to base an accurate judgment of the risk of recovery. In a single term, the Supreme Court may vastly alter principles that affect lawsuits filed years previous. Last term, for example, the Court decided at least twenty such cases affecting civil rights and federal procedure.

The contingency factor derived from commercial cases. Arenson v. Board of Trade, 372 F.Supp. 1349 (N.D.Ill. 1974) (multiplier of 4.0); In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 410 F.Supp. 680 (D.Minn. 1975) (multipliers of 2.0 and 2.5); Weiss v. Drew National Corp., 465 F.Supp. 548 (S.D.N.Y. 1979)(15% increase because the case, although not unusually complex, was hard fought over three years); Wolf v. Frank, 555 F.2d 1213, 1217 (5th Cir. 1977)(one-third increase in stockholder's derivative suit when the district court found and the court of appeals agreed "that the issues were neither novel or unusually complex and that the chances of success were not remote.")

When the legislative history of the Fees Act approved Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), it expressly approved contingency consideration. Three of those factors are contingent factors. Northcross v. Board of Education, 611 F.2d 624, 643 (6th Cir. 1980). Subsection (e), by removing these factors, factors uniformly approved by all circuits, skews the courts' ability to determine reasonable fees in a manner fundamentally at odds with the purposes of the Act.

Subsection (e) presents several other problems. The use of the term "prevailing market rate" will create problems for in many instances there simply is no prevailing market rate. Further requiring this rate to be "for the particular area" alters the standard from the legislative history of the Fees Act that fees awarded are to "be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases. . ." Senate Report at 6. This report broadened the standard used in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 719 (5th Cir. 1974), where the court surveyed Title VII cases from around the country. Thus under the legislative history the standards were not limited to the particular area of the law or area of the country.

If Subsection (e)'s phrase "for the particular area" means "area of the law," this would be meaningful if: (a) there were a prevailing market rate, and (b) if the market rate equitably reflected the value of the work. The problem is, neither one of these prerequisites exist.

According to a study of the American Bar Foundation, "Specialization and Prestige: The Structure of Deference," American Bar Foundation Research Journal (1977, No. 1), the least prestigious legal specialties were judged to be poverty law and services done for minorities or reformist purposes. This leads to lack of ability to attract high paying clients.

A prevailing market rate presumes sufficient numbers of cases to assess such rate. Let us look at voter law. According to the Annual Report of the Director of the Administrative Office of the United States Courts, 1980, Table 28, p. 70, the number of cases involving voting in some aspect filed in federal courts in 1980 was 160. This figure includes those filed by the federal government. Very few of these cases were instances in which clients paid attorneys' fees directly. A prevailing market rate for voter law cases does not exist.

If Subsection (e) is speaking of a geographical area rather than an area of the law, it is fundamentally at odds, in fact defeats, the purpose of the Fees Act. It is addressing a problem which does not exist in response to an objection that would in fact deny access to counsel.

The problem that does not exist is a plaintiff going hundreds of miles of retain a higher priced attorney when closer and less expensive counsel are available. Plaintiffs do not do this. When they go long distances for counsel, it is because of unavailability of local counsel willing and able to handle the matter. It has been my uniform experience in constant dealings with the civil rights bar and clients, that the bar does not like to handle cases at great distances if other counsel can be retained.

The underlying objection to paying non-local rates is that the local defendants feel they are paying too much. But they are not paying too much. They are paying higher than local rates because local counsel are unavailable to civil rights clients. Subsection (e) would most affect plaintiffs in rural areas, or small cities. Lawyers can usually be found in the larger cities. It is in the rural areas that lawyers cannot be found to handle civil rights cases and fee scales are lower. Limiting fee awards to the prevailing market rate of the geographical area will severely hamper efforts to secure counsel for injured persons, and if counsel can be found, will shift the economic burden to counsel. It is difficult enough, even after six years of the Fees Act, to secure representation for individuals, without making it more difficult.

F. PROPOSED SUBSECTION (f)

Proposed Subsection (f) states: "A party seeking an award of fees and other expenses under section 722 of the Revised Statutes (42 U.S.C. §1988) shall, within 30 days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this section. The application shall state the amount of fees and other expenses sought, including an itemized statement from any attorney or expert witness representing or appearing on behalf of the party, stating the actual time expended, the precise nature of the work done during each increment of time expended, and the rate at which fees and other expenses were computed."

SUMMARY

This subsection inserts a 30-day time limitation for applying for fees, requires that the application show that the party is a prevailing party, and codifies the information required in fee computation.

ANALYSIS

The use of the phrase "final judgment" both here and in Subsection (b) requires careful consideration. "Final judgment" is a term of art, yet one whose meaning is not uniform. Its use in these amendments does not appear to be well thought out. For example, in Subsection (b), if a party prevailed on a pendent claim by settlement rather than by final judgment, Subsection (b) apparently would have no effect. If final judgment is meant to be synonymous with Rule 58, Federal Rules of Civil Procedure, fee application will often be delayed because in civil rights cases judgments are not always entered simultaneously with opinions.

In appropriate cases, interim fees may be awarded. Bradley v. School Board of the City of Richmond, 416 U.S. 696 (1974), Senate Report at 5, House Report at 8. The language of Subsection (f) may confuse this area. To the extent that Subsection (f) would allow fees only after final judgments, it would have the intended or unintended effect of overruling solid Supreme Court precedent and controverting the clear intent of Congress in enacting the Fees Act.

Often parties wish to litigate fees after appeal because the entitlement to fees may be reversed. If no fees will be allowed ultimately, both sides wish to avoid the time and expense of fee litigation until the merits are decided. Subsection (e) appears not to allow this. It would be preferable to alter the language to permit deferring the application by court order or agreement of the parties.

The 30-day time limit can raise some problems. Discovery is sometimes required, particularly if the applicant must demonstrate the prevailing market rate. If, in view of Subsection (d), the applicant must show the preponderant reason for mootness as an element of the application, discovery is needed which may not be accomplished in 30 days. Although there is little objection to a time limit, it is not something for which there is a need. Fee applications, out of economic interest, are made as soon as possible. Defendants are in no sense injured by a delayed fee application as long as they are advised that a fee application will be made. Courts simply do not allow, as an equitable matter, fee applications filed long after the case has ended.

The requirements of Subsection (f) that the application "show[] that the party is a prevailing party and is eligible to receive an award under this section" is essentially meaningless. Everyone is "eligible" if filing under this section except the United States. To also burden the fee applicants with showing the applicant is a prevailing party creates unnecessary paperwork. The record in the case shows who is the prevailing party.

The last sentence of Subsection (f) essentially codifies what is the practice required by all federal courts. The risk of not recovering fees because of defects in the application are on the applicants, and fee applications are now as detailed as possible.

* * *

Because Section 2 of S.585 overall detracts from the fundamental purposes of providing access to counsel to enforce and protect the rights of individuals encompassed by the Civil Rights Attorneys' Fees Awards Act of 1976, the American Civil Liberties Union opposes this amendment.

Thank you for the opportunity for presenting our views.

Senator DeConcini. Mr. Farrington?

STATEMENT OF FLETCHER FARRINGTON

Mr. Farrington. Thank you, Senator.

I am Fletcher Farrington from Savannah, Ga. I am honored that the Senator identified me as being with the NAACP legal defense fund. I am what they call a cooperating attorney with that fund, but I come here as an unsubsidized, unsalaried practicing lawyer who makes my living in court.

Senator DeConcini. I know, Mr. Farrington. You have been here many times before. We are glad to see you here again. Thank you for that explanation.

Mr. Farrington. Thank you.

A substantial part of my practice is representing clients in civil rights cases. I primarily represent plaintiffs, but I have also and do now represent defendants, including municipal defendants in section 1983 cases. Consequently, I think I have at least a balanced experience if not a balanced perspective on what I am about to say.

I oppose the amendments to section 1988. I understand that the impetus is that the 1976 act is thought to have engendered frivolous insubstantial claims. I do not believe that. I do not believe that there has been any evidence presented to this subcommittee that would indicate that. I do not believe that the proposed amendments would change or would forestall frivolous litigation.

I have obtained some substantial verdicts from juries, taxpayers in their own communities, verdicts that will come out of their own pockets. And it is not because the southern district of Georgia is any hotbed of liberalism. And it is not because of any special skill I bring to the court. But it is because citizens, taxpayers, the people who make up our juries and juries all over the country are simply incensed at official tyranny and arrogance.

In my experience, these are the kinds of cases that come to court. The reason for these verdicts has nothing to do with the 76 amendments. It has to do primarily because municipal governments often get bad advice from their own counsel and sometimes do not follow the advice of counsel. I just would like to point out one example that I cite in my written testimony. I would like that to be made a part of the record, if I might.

Senator DeConcini. Without objection, it will be made a part of the record.

Mr. Farrington. A county in Georgia discharged two employees and refused to reinstate one of them on the advice of its lawyer. The client came to me on referral from another lawyer. I looked into it. I wrote to the county. I said: "I believe this man's constitutional rights have been violated, and here are the rights." The lawyer says: "No, we don't think that he has any such rights," and consequently declined to reinstate him.

We brought suit. After discovery, the lawyer changed his mind, decided that there was some possible liability. On the eve of trial, he recommended to his clients that they accept plaintiff's offer of settlement of $8,000. The county commission unanimously declined to accept that offer. The jury brought back a verdict of $74,000. He was also entitled to reinstatement and counsel fees.

The other verdicts that I have had in that class also can be attributed simply to the initial unconstitutional conduct of the city or the county and then to its stubbornness and arrogance in refusing to concede that. In every case the government could have gotten out for as little as one-third of what the ultimate award was.

I simply do not believe that the 1976 act has encouraged frivolous litigation. I brought cases under section 1983 before the 1976 act, and I have brought them afterward. There has not been any difference in the number of suits that I have filed.

The proposed amendments would, I believe, and could work just precisely the opposite to the way they are intended, if they are intended to forestall frivolous litigation. I would like to speak to two of those.

One of the two most troublesome is the prevailing rate in the area. Now, looking at it from a defendant's point of view, that kind of troubles me. Let us say that a plaintiff's lawyer came in and says: Well, judge, I've got evidence out here that the prevailing rate, plaintiffs' lawyers who take contingent fee cases in this district, is about $250 an hour. And that is true in some districts. The rate of return for plaintiffs' lawyers on the times they put in their successful cases—I am talking about personal injury cases, products liability cases, is at least $250 an hour.

The proposed amendments certainly are not clear whether we are talking about prevailing rates for defendants' lawyers or prevailing rates for plaintiffs' lawyers. There is a great difference.

Second, that is troublesome because I am not sure what the area is. The nature of civil rights practice is such that there are not many lawyers on either side of the fence, either plaintiffs or defendants, who take the cases for a variety of reasons, primarily economic. That is why in the southern district of Georgia I wind up representing both sides because there are not enough people to go around to do it.

Now, for me my area is southern Georgia. In Brunswick, 60 miles to our south, the city attorney gets $40 an hour. In Sylvania, 75 miles to the northwest, he gets $75 an hour. Now, is the district judge to say add those two together and divide them by two and say, well, this is the prevailing rate in the area? Is the successful plaintiff's lawyer in Sylvania to get $75 an hour and the defendant in Brunswick who prevails on a clearly frivolous claim to be restricted to $40 an hour?

My point is that the standard is simply unworkable. The courts have developed a number of criteria based on American Bar Association standards for evaluating counsel fee awards. Speaking as a plaintiffs' lawyer, the courts are a little bit stingy. I do not think we get paid the value of our hire in these cases but they are workable.

I read some of the testimony and some of the horror stories that were recited about how lawyers got these outrageous fees. I have never seen it happen in a civil rights case. It is my best guess that that is simply what the lawyers asked for. I have never seen that kind of a fee awarded in a civil rights case. I do not believe that it ever has been.

The other thing that concerns me about the amendment is the prohibition against bonuses, multipliers, and contingency factors. It is a simple fact of economic life that, if you take a plaintiff's case on a contingency, you have to make more on the cases that you win than you would if you were on the other side getting paid for every hour that you do. If you do not make more on the cases that you win—and no plaintiffs' lawyer, irrespective of what he may tell other people, wins all his cases. If there is not some way to balance out the equities, then it is simply uneconomical. You simply cannot do it.

In my written testimony I demonstrate that, if this amendment is passed, then, assuming a market rate of $60 an hour, my actual return on my cases will be about $25 per hour. I simply cannot practice. I cannot take cases for that because my overhead is more than that.

I urge the subcommittee, with the exception of the adoption of the Christiansburg standard, which is workable and which I believe should be incorporated into the act, I urge the subcommittee not to adopt the other proposed amendments. Thank you.

Senator DECONCINI. Thank you very much.

[The prepared statement of Mr. Farrington follows:]

PREPARED STATEMENT OF FLETCHER FARRINGTON

Mr. Chairman and members of the Subcommittee, I wish to express my appreciation for the privilege and opportunity to appear before you.

My name is Fletcher Farrington and I have been engaged in the private practice of law in Savannah, Georgia since March, 1971. Prior to that, I was a trial attorney in the Civil Rights Division of the U.S. Department of Justice. The majority of my private practice consists of plaintiff's litigation in federal court and includes actions brought under various federal civil rights statutes, including 42 U.S.C. §1983 -- the Civil Rights Act of 1871.

I recognize that the primary purpose of today's hearing is to consider testimony concerning proposed amendments to the 1976 Civil Rights Attorneys' Fees Award Act, 42 U.S.C. §1988, presently before this Subcommittee. However, I also understand that the impetus behind those proposed amendments are two U.S. Supreme Court decisions[1/] involving civil rights suits against state and local governments under §1983. As one who has specialized in that area of civil rights litigation, I will address the proposed amendments to the Attorneys' Fees Act within the context of §1983 suits.

While in private practice, I have tried twelve cases under §1983.[2/] Seven of these have resulted in verdicts for plaintiffs. I also have three §1983 cases pending: two on behalf of plaintiffs, and one in which I represent the City of Sylvania, a small rural community 65 miles northwest of Savannah.

At the outset, I would note that my experiences with these cases teach three basic principles. First, I have found that where a government official was faced with a situation requiring him to act quickly, juries have not found liability even though in retrospect it appears that the official's actions were inept. On the other hand, where a civil rights violation is the result of deliberate acts, juries have very nearly uniformly found liability. Maine v. Thiboutot does nothing to alter these traditional results.

Second, the primary reason for the substantial verdicts against local governments has not been the larceny of plaintiff's lawyers, but the poor advice given to some governments by their own attorneys--many of whom owe their positions to reasons other than familiarity with Constitutional principles--or by the failure of other local governments to follow the sound advice of their counsel. A case in point is Rozier v. Ware County, listed in the Appendix hereto. There, the County refused to reinstate the discharged plaintiff on the advice of its own lawyer. During discovery, the County's lawyer realized that there might indeed be liability and consequently, on the eve of trial, advised the County Commission to accept the plaintiff's offer of settlement of $8,000. The Commission unanimously declined. The jury's verdict was for $74,000, reinstatement of the plaintiff, and counsel fees.

The reason for this and like successes is not that the Southern District of Georgia is a hotbed of liberalism, or because of any particular skill I might bring to the courtroom. They succeed because these cases typically involve what I call "official arrogance." The people who make up the juries in our district (and throughout the nation) -- fishermen, millworkers, farmers, government employees, stevedores, bankers -- are genuinely incensed by the tyranny of local government officials. Those jurors do not carry the First, Fifth or Fourteenth Amendments around with them in their heads; but when they do examine our Constitution when considering these cases, and compare what it says to what local government officials occasionally deem as their absolute prerogative, they inevitably find for plaintiffs. Juries simply do not permit public officials, in whom have been placed a public trust, flagrantly to violate it. More than any other single factor, the size of awards against state and local governments reflects the indignation of juries against abuses by public officials.

Third, the 1976 amendment to §1988 has had no affect on the number of cases filed under §1983. As my summary demonstrates, these cases remain at the very low end of economic desirability. If they were desirable, other lawyers would not refer them to me but would try them themselves. Ninety percent of my cases come on referrals from other lawyers. In eleven years, I have devoted approximately 2400 hours to litigating "pure" 193 cases.[3/] To date, I have recovered a total of $25,000 in attorney's fees, on verdicts totalling $174,000. On cases tried since the 1976 amendments to §1988, I have obtained verdicts totalling $134,000, and have received fees of $24,000. No nonprofit civil rights organization has supported any of these cases. While my rate of return -- $10.00 per hour -- may improve, depending on the decisions in three cases that are now pending before trial and appellate courts, it will never improve to the point where I earn as much as the lawyers on the other side. The only case I have ever taken because of the prospect of adequate compensation is the one in which I am defending the City of Sylvania, for which I am paid on a hourly basis as the work is done. The 1976 Attorneys' Fees Act has not produced a "windfall" for attorneys regularly engaged in civil rights practice.

The proposals now before this Subcommittee to amend the existing provisions of the 1976 Civil Rights Attorneys' Fees Award Act are therefore of particular concern to me and to those to whom my services have been extended in defense of their civil rights. Indeed, I would emphasize that the very purpose of the 1976 Attorneys' Fees Act was to insure that private practitioners, such as myself, make available their services in vindication of Congressional policies. As Congress noted in 1976, the civil rights laws it has enacted since 1866 "depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain".[4]

The present language of the 1976 Act effectuates a delicate balance between effective private enforcement of civil rights, on the one hand, and built-in constraints on the bringing of frivolous or vexatious suits on the other. The amendments before this Subcommittee would disrupt that balance at a wholly unwarranted cost to effective civil rights enforcement.

The constraints in the present Attorneys' Fees Act are in practice highly effective provisions in insuring that only the most meritorious of claims are filed under §1983. They require that first a plaintiff must "prevail" in order to recover attorneys' fees. A private practitioner must project months, often years in the future and attempt to make some realistic assessment as to the ultimate outcome of a potential suit. The choice is governed by simple economics where the claim is obviously frivolous, given a finite number of billable hours a year in which to sustain a practice. The truly tough decisions, however, are those involving clearly meritorious claims, but which also involve difficult or new questions of law. Many of those cases must also yield to economics, when based on initial assessments of ultimate success or failure.

A second constraint in the present Act provides that even if the plaintiff ultimately prevails, a trial judge may deny fees if he or she finds "special circumstances." It is not uncommon for trial judges to find such special circumstances.[5] Thus, while a plaintiff may receive ultimate relief, the attorney goes uncompensated.

The third constraint, of course, is the prospect that fees may be awarded to the defendant where the suit is found to have been, in some way, vexatious. While those fees may be assessed against the plaintiff, the reputation of a civil rights practitioner is ill-served by having advised or agreed to prosecute such an action.

In addition, I consider these factors in deciding whether to institute action against a local government:

1. Is the injury to the client substantial?
2. Were the responsible officials aware, at the time the act was done, that the client had a Constitutional interest at stake?
3. Has the government been made aware that its acts are in violation of the Constitution?
4. Has the government demonstrated any legitimate countervailing local interest?
5. Has the government made a good faith effort to resolve the competing Constitutional and local interests? If not, does the attitude of the responsible officials demonstrate arrogance?
6. Is the case one in which the community has shown an interest?
7. Is the case likely to benefit others; that is, is it likely to have a prophylactic effect on the Constitutional conduct of the government involved?

For each case that I file, I turn down a dozen or more. I accept only those cases where the prospects of winning are reasonably certain and where the client is able to pay substantially all of the costs of trial.

I oppose the presently proposed amendments to §1988, except to the extent that they codify the Christiansburg standard. Even in that regard, however, the amendment would be unnecessary since the Supreme Court's decision in Christiansburg Garment Co. v. E.E.O.C., 434 U.S. 412 (1978) firmly establishes the standard for awarding fees against plaintiffs who prosecute frivolous or vexatious suits.

In all other respects I oppose the amendments since they create additional obstacles to the bringing of meritorious suits and also because they would lead to protracted and burdensome litigation over the vague and unenforceable standards they adopt.

The amendments would deny fees for successful pendent claims under 42 U.S.C. §1988, unless the Court finds that the "preponderant reason for such joinder was not to recover attorneys' fees." This additional inquiry would only serve to protract the litigation and runs counter to the policy of efficient judicial administration embodied in the joinder of claims under Federal Rule of Civil Procedure 18(a). Moreover, it is wholly unnecessary since the Supreme Court in Maher v. Gagne[6/] has held that fees may be awarded on pendent claims, provided the federal claim is not frivolous. The Maher standard is adequate to insure that joinder under §1988 is not attempted for the sole purpose of recovering attorneys' fees on a state law claim. Moreover, the Maher standard does not interfere with an attorney's professional judgment in deciding whether or not to join a meritorious pendent claim, unlike the proposed amendment.

Another proposed revision is to deny fees for work subsequent to a declined offer of settlement, which is as "substantially favorable" as the ultimate relief awarded by the court. Again, determining what is "substantially favorable" will result in additional litigation on a case by case basis. This provision is also likely to place the attorney and his client in a conflict-- the attorney may feel compelled to encourage the plaintiff to accept a less than adequate settlement, rather than risk denial of fees for litigating to a judgment. While settlements are to be encouraged, this Subcommittee would reject any language which conditions an award of fees on a settlement offer.[7/] On the other hand, a defendant can make an offer of judgment, pursuant to Federal Rule of Civil Procedure 68, under which a plaintiff must bear the additional costs of litigation if the final judgment "is not more favorable" than the declined offer. This provision avoids the attorney-client conflict, while at the same time discouraging unnecessary litigation by charging costs to the plaintiff. Again, existing law is superior to the proposed amendment.

The proposal to deny fees where a claim is rendered moot by a change in government policy,[8/] unless "the preponderant reason" for the change was the pendency of the suit, will also require additional case by case litigation. Moreover, placing an impossible burden on a plaintiff to prove the "preponderant reason" for government action is simply unfair. Under present law, fees in cases mooted by remedial government action are recoverable where "the chronology of events" reveals that plaintiffs' suit activated the defendant to modify its behavior -- even though the defendant never admits liability.[9/] If factors other than the lawsuit motivated the change in policy, then clearly the burden should be on the party having ready access to the evidence--that is, the defendant--to prove the "preponderant reason" for the change.

The amendment restricting fees to the prevailing market rate for a particular area runs counter to the legislative intent, underlying the 1976 Act, to equalize fee standards under §1988 with other complex federal litigation and to attract competent counsel.[10/] While defendants may choose to hire specialized counsel from New York or Washington, at New York or Washington rates, plaintiffs would be precluded from doing so. Even more objectionable is the prohibition against contingency factors or multipliers. The courts have recognized that attorneys who are paid only if they win are entitled to higher rates than attorneys who are paid win or lose.[11/] Moreover, since years may separate the filing of a suit and the receipt of attorneys fees under §1988, inflation takes a toll. The Act will no longer attract competent counsel in the private enforcement of civil rights, should this amendment be adopted, for the simple reason that it would bar the awarding of "reasonable" attorneys' fees.

Over the years, I have won two-thirds of my cases. This percentage compares favorably with other areas of the law such as personal injury and products liability. If I am limited in each of those cases to the market rate - for example, $60 per hour - then my return in all of these contingent cases is only two-thirds the market rate. In addition, the usual length of my cases varies between three and four and a half years. Due to inflation, the $60 an hour is effectively reduced to $25 per hour. While the government lawyer representing a civil rights violator will receive $60 per hour regardless of the outcome of the case, the lawyer who undertakes the greater risk in vindicating the constitutional rights of citizens, winds up with $25 per hour _if_ _successful_. Absent contingency or multiplier adjustments, this amendment will end my civil rights practice on behalf of plaintiffs.

As the only member of today's panel in private practice, I trust that my brief comments have served to represent the experiences of the hundreds of deeply committed attorneys across this country, regularly engaged in civil rights practice, whom you have not had the opportunity to hear from. While there is no question that my colleagues on the staffs of the non-profit civil rights organizations bear an inordinate burden in the private enforcement effort, a greater burden is also borne by those in private practice. These amendments, if enacted, would do grave and irreparable damage to private enforcement of Congressional civil rights policy, because no matter how committed we as private practitioners are, we are entitled to and must continue to receive reasonable fee awards if we are to sustain our civil rights practices.

State and local governments also bear a responsibility for civil rights -- a responsibility they should not be allowed to escape under the guise of protecting them from greedy lawyers and malicious prosecution. If nothing else, I hope my comments today have quelled those false alarms.

FOOTNOTES

1/ *Maine* v. *Thiboutot*, 448 U.S. 1 (1980) and *Owen* v. *City of Independence*, 445 U.S. 622 (1980).

2/ See attached summary.

3/ I have tried several other §1983 cases in which Title VII of the Civil Rights Act of 1964 was also involved. Because of the different standard of proof applicable to the two statutes, I have not included these cases.

4/ Senate Report No. 1011, 94th Cong., 2d Sess. 2 (1976).

5/ See e.g. *Chastang* v. *Flynn & Emrich Co.*, 541 F.2d 1040 (4th Cir. 1976); *Drake* v. *Southwestern Bell Telephone Co.*, 553 F.2d 1185 (8th Cir. 1977); *Young* v. *Kenley*, 465 F.Supp. 1260 (E.D. Va. 1979); *Johnson* v. *Shreveport Garment Co.*, 422 F.Supp. 526 (W.D. La. 1976); *Naprstek* v. *City of Norwich*, 433 F.Supp. 1369 (N.D. N.Y. 1977); *Goodall* v. *Mason*, F.Supp. (E.D. Va. 1976); *Clanton* v. *Allied Chemical Corp.*, 409 F.Supp. 282 (E.D. Va. 1976).

6/ 448 U.S. 122 (1980)

7/ The City Bar Association of New York has issued an opinion stating that it is unethical for defense attorneys to condition settlements on waiver of statutory fees. See Opinion 80-94, *The Record of the City of New York*, Vol. 36, no. 7 (Nov. 1981), p. 507.

8/ In one such suit, the Fifth Circuit quite properly held that: "The fact that (a) case did not proceed very far in court before becoming moot...(is a matter) to be considered by the district court in making its assessment of fees; (it does) not constitute sufficient reason to deny any award." *Criterion Club of Albany* v. *Bd. of Commissioners*, 594 F.2d 118 (5th Cir. 1979).

9/ See *Robinson* v. *Kimbrough*, 652 F.2d 458, 465 (5th Cir. 1981).

10/ S. Rep. No. 94-1011, *supra*, p. 6.

11/ See *Jones* v. *Diamond*, 636 F.2d 1364, 1382 (5th Cir. 1981) (en banc).

CASE	JURISDICTION	DEFENDANT	YEAR FILED	YEAR RE-SOLVED	ISSUE	PLAINTIFFS OFFER TO SETTLE	RESULT	ATTY. FEE AWD.	ATTY. FEE REC'D.
Blake v. Department of Corrections	S.D.Ga. Sav. Div. (one decision by Fifth Circuit)	Prison officials Prison doctor	1969	1975	Defs. w/held medical treatment, causing perm. injury	None	Defendant's verdict	--	--
Kennedy v. Barnard	S.D.Ga. Sw'boro Division	Prison guards	1970	1974	Guards shot 2 middle aged black men while looking for 2 young white escapees	None	$40,000 verdict (uncollectable)	None	None
Jennings v. Patterson	M.D.Ala. E. Div. (2 decis. by 5th Circuit)	City of Dadeville, Private Individual	1971	1974	City refused to remove barricade of public street erected by whites to prevent blacks from using street	Remove barricade	Plaintiff's verdict; injunction; no damages asked	None	$1,000
E. Brown v. City of Savannah	S.D.Ga. Sav. Div.	City & Police Officers	1972	1974	Officers severely beat plaintiff inside his home	None	Defendant's verdict	--	--
Simmons v. Highsmith	S.D.Ga. Sav. Div.	Superior Ct. Clerk	1972	1974	Clerk, on fee system, discarded pro se prisoner petitions	None	Plaintiff's verdict; injunction & nominal damages	None	None
Breedlove v. Housing Auth.	S.D.Ga. Sw'boro Div. (one decision by 5th Cir.)	Housing Authority	1972	1976	Sex discrimination - promotion	None	Court ruled for def., affirmed on appeal	--	--
Williams v. DeKalb County	N.D.Ga. Atla. Div. (2 decis. by 5th Cir. appeal pending)	County government	1972	pending	Race discrimination - promotion & discharge	$25,000	District ct. ruled for def. reversed on appeal; on rehearing, modified; on remand, court ruled for def.; appeal pending	--	--

CASE	JURISDICTION	DEFENDANT	YEAR FILED	YEAR RE-SOLVED	ISSUE	PLAINTIFFS OFFER TO SETTLE	RESULT	ATTY. FEE AWD.	ATTY. FEE REC'D.
M. Brown v. City of Savannah	S.D.Ga. Sav. Div.	City Gov't; ind. officers	1975	1978	Officers shot & killed unruly mental patient on steps of his parents' home	None	Defendant's verdict	--	--
Rozier v. Ware County	S.D.Ga. Waycross Div.	County gov't.	1977	1979	County refused to reinstate pl. after Ga. Ct. of Appeals ruled he had committed no crime	$8,000	$74,000 verdict plus right to reinstatement & counsel fees	None	$24,000
Williams v. Valdosta	M.D.Ga. Val. Div.	City gov't.	1980	pending	City demoted pres. of firefighters union	$12,000 & reinstatement	$25,000 verdict, plus right to back pay, reinstatement & counsel fees; court granted new trial; on appeal	None	None
Potter v. Brunswick	S.D.Ga. Bruns. Div.	City gov't.	1980	pending	City fired pres. of police fraternal organiz.	$15,000	$35,000 verdict, plus right to back pay, reinstatement & attys. fees; motion for new trial pending	None	None

Senator DECONCINI. Ms. Hernandez, we are very pleased to have you here today, a former staff member of this committee. We welcome your representation of MALDEF. You may proceed.

STATEMENT OF ANTONIA HERNANDEZ

Ms. HERNANDEZ. Mr. Chairman and members of the subcommittee, my name is Antonia Hernandez. I am associate counsel with MALDEF, the Mexican American Legal Defense and Educational Fund. MALDEF is a civil rights organization dedicated to the protection and promotion of the civil rights and constitutional rights of close to 15 million Mexican Americans and other Hispanics, nearly 7 percent of the population.

I have prepared a written statement. I request that it be admitted into the record.

Senator DECONCINI. Without objection, it will be made a part of the record.

Ms. HERNANDEZ. I will highlight certain parts of our written testimony.

The issue posed by S. 585 is much more basic than money. The 1976 Fees Act is not a lawyers' relief bill. It was a basic civil rights law designed to give minorities and the poor a small measure of access to the courts in furtherance of the national policy to protect and defend civil rights. Congress found that the direct enforcement of civil rights by the victims of civil rights violations was severely hampered by the inability to pay the substantial costs and fees attendant upon legal proceedings. In providing for the contingent possibility of a fee award for meritorious cases, Congress lessened but did not even purport to eliminate this obstacle to the vindication of civil rights. Minorities and poor persons remain the underdogs in civil rights litigation today, and indeed only a fortunate few can secure legal representation for such litigation. But at least they have a chance to prevail in their uphill battle, thanks to the 1976 act. S. 585 would drastically change the odds against them and severely inhibit the private enforcement of civil rights.

The rationale that brought enactment of the Fees Act in 1976 is at least as compelling today as it was then. Civil rights violations have not ceased, and in most areas have not even diminished since 1976. The poor and minorities, who hear the brunt of that discrimination, are even less able to pay the ever-increasing costs of legal representation. MALDEF is intimately familiar with the plight of Mexican Americans and other minorities in this country. Day in and day out we encounter instances of blatant discrimination. Because Mexican Americans sit on the lower rungs of the economic ladder in this country and are the victims of pervasive practices of discrimination in employment, education, voting, police treatment, and public programs, they are in dire need of legal assistance. Yet, because of their poverty they cannot afford private legal representation to correct these abuses. They call on MALDEF in huge numbers, and we cannot begin to provide even a small fraction of the legal services needed by these desperate citizens.

Mexican Americans cannot rely on Government agencies to protect their constitutional and civil rights. Federal agencies' protection of civil rights is subject to political considerations in all administrations. One need only look at the present administration, with its overt declarations that Government will allow certain racially discriminatory practices to persist, to realize that citizens cannot rely exclusively on government attorneys to advocate for enforcement of constitutional guarantees. Even where the Government chooses to act conscientiously to enforce the civil rights laws, its lawyers cannot possibly meet the need.

Already overburdened by bureaucratic inefficiency and, in some cases, heavy backlogs, Government enforcement agencies' resources are further strained by the recent budget cuts. Finally, it would be bad policy to leave all enforcement actions to Government attorneys even if they could and would defend the Constitution diligently. The genius of our American system lies in its ultimate reliance on the good sense and private resources of the people.

Senator DECONCINI. Thank you very much, Ms. Hernandez.

[The prepared statement of Ms. Hernandez follows:]

PREPARED STATEMENT OF ANTONIA HERNANDEZ

Mr. Chairman, members of the Subcommittee, my name is Antonia Hernandez. I am Associate Counsel with MALDEF, the Mexican American Legal Defense and Educational Fund. MALDEF is a national civil rights organization dedicated to the protection of the civil rights and constitutional rights of close to 15 million Mexican Americans and other Hispanics--nearly 7% of the U.S. population.

I am here today to testify in opposition to S. 585 authored by Senator Hatch. S. 585 seeks to create a "good faith" defense to § 1983 damages and it seeks to limit attorney's fees in civil rights litigation by amending a good law which needs no revision, the Civil Rights Attorney's Fees Awards Act. My remarks here are limited to the attorney's fees proposals. I join in the views of other opponents of the proposed "good faith" amendment.

The 1976 Fees Act

The Civil Rights Attorney's Fees Awards Act of 1976, codified in 42 U.S.C. § 1988, was Congress' response to the Supreme Court decision in Alyeska Pipeline Service Company v. Wilderness Society,[1] where the Court applied to public-interest proceedings the rule that, "In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorney's fee from the loser."[2] Before Alyeska, most lower courts had awarded successful plaintiffs attorney's fees in civil rights or public interest cases. The Supreme Court ruled this improper, in the absence of legislation authorizing such awards.

Congress' response to the Alyeska decision was swift and conclusive: the enactment of the 1976 Act. The main purpose and importance of the Act, as stated in the Senate Report was to reverse the holding of the Supreme Court: "The purpose of this amendment is to remedy anomalous gaps in our civil rights laws created by the United States Supreme Court's recent decision in Alyeska and to achieve consistency in our civil rights laws."[3] It continued:

> The purpose and effect of [the Fees Act] are simple--it is designed to allow courts to provide the familiar remedy of reasonable counsel fees to prevailing parties in suits to enforce the civil rights acts which Congress has passed since 1866...All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.
>
> In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.[4]

The enactment of the 1976 Act was the culmination of a thorough process of legislative consideration in which many of today's Senators participated. Both this Committee and the House Judiciary Committee conducted extensive hearings and issued thorough reports finding a great need for the Act and strongly endorsing the provisions of the bill which became the 1976 Fees Act. The votes on passage were not close; the Senate approved the Act 57-15 (28 not voting), and the House passed the Senate's bill by 306-68.[5] Although the Fees Act therefore represents the recent and well-considered views of Congress, S. 585 would radically change many of its provisions and its application in the federal courts, in ways contrary to the fundamental intent of the 94th Congress. I urge this Subcommittee to reject this attempt to vitiate a good and successful law.

The Need For A Strong Attorney's Fee Statute

The issue posed by S. 585 is much more basic than money. The 1976 Fees Act is not a lawyer's relief bill: it was a basic civil rights law designed to give minorities and the poor a small measure of access to the courts in furtherance of the national policy to protect and defend civil rights. Congress found that the direct enforcement of civil rights by the victims of civil rights violations was severely hampered by their inability to pay the substantial costs and fees attendant upon legal proceedings. In providing for the contingent possibility of a fee award for meritorious cases, Congress lessened-- but did not even purport to eliminate--this obstacle to the vindication of civil rights. Minorities and poor persons remain the underdogs in civil rights litigation today, and indeed only a fortunate few can secure legal representation for such litigation. But at least they have a chance to prevail in their uphill battle, thanks to the 1976 Act. S. 585 would drastically change the odds against them, and severely inhibit the private enforcement of civil rights.

The rationale that brought enactment of the Fees Act in 1976 is at least as compelling today as it was then. Civil rights violations have not ceased, and in most areas have not even diminished, since 1976. The poor and minorities, who bear the brunt of that discrimination, are even less able to pay the ever-increasing costs of legal representation. MALDEF is intimately familiar with the plight of Mexican-Americans and other minorities in this country. Day in and day out we encounter instances of blatant discrimination. Because Mexican-Americans sit on the lower rungs of the economic ladder in this country and are the victims of pervasive practices of discrimination in employment, education, voting, police treatment, and public programs, they are in dire need of legal assistance. Yet, because of their poverty they cannot afford private legal representation to correct these abuses. They call on MALDEF in huge numbers, and we cannot begin to provide even a small fraction of the legal services needed by these desperate citizens.

Mexican-Americans cannot rely on government agencies to protect their constitutional and civil rights. Federal agencies' protection of civil rights is subject to political considerations in all administrations. One need only look at the present administration, with its overt declarations that government will allow certain racially discriminatory practices to persist, to realize that citizens cannot rely exclusively on government attorneys to advocate for enforcement of constitutional guarantees. Even where the government chooses to act conscientiously to enforce the civil rights laws, its lawyers cannot possibly meet the need. Already overburdened by bureaucratic inefficiency and, in some cases, heavy backlogs, government enforcement agencies' resources are further strained by recent budget cuts. Finally, it would be bad policy to leave all enforcement actions to government attorneys even if they could and would defend the Constitution diligently. The genius of our American system lies in its ultimate reliance on the good sense and private resources of the people.

Because government attorneys cannot adequately protect the citizenry from civil rights violations, there is a continued public interest and necessity in private attorneys' advocacy of civil rights. Passage of S. 585 would seriously erode even the present, inadequate level of private attorney advocacy.

Amendments Proposed in S. 585

1. S. 585 seeks to change the standards under which prevailing defendants may be awarded attorney's fees in civil rights cases. Under S. 585 fees would be awarded to prevailing plaintiffs "unless special circumstances would render such an award unjust"; this is the prevailing standard under current caselaw and is explicitly approved in the legislative history of the 1976 Fees Act.[6] Thus, S. 585's standard for prevailing plaintiffs adds nothing, but would bring an unnecessary provision onto the books.

For prevailing defendants, S. 585 proposes to make fees awardable if the court finds that the position of the party making a claim was "not substantially justified and special circumstances would not make an award unjust." Unlike the plaintiffs' standard, this provision would make a significant change from judge-made principles now followed by the courts.

Under present law,

> such an award may be made only if the action is vexatious and frivolous, or if the plaintiff has instituted it solely to 'harass or embarrass' the defendant...If the plaintiff is 'motivated by malice and vindictiveness', then the court may award counsel fees to the prevailing defendant...Thus, if the action is not brought in bad faith, such fees should not be allowed.[7]

However, under S. 585's standards a fee award could be made to a defendant, if a plaintiff brought forth a claim in good faith and with some evidence of a civil rights violation, but did not prevail in the case. Whether such an award is actually made in a particular case would depend on the trial judge's application of the vague "substantial justification" test of S. 585.

Knowing that they might be ordered to pay defendants' attorney's fees, plaintiffs would face an awesome "chilling effect" on good faith claims that were not--as most are not--absolutely certain winners. Moreover, the vagueness of the standard would at best lead to unpredictable and inconsistent results, and at worst provide a tool for harassment of unpopular claimants or claims. What may be seen in hindsight as "substantially justified" could well be anything that displeases an unsympathetic judge. The potential cost of litigating ancillary proceedings on this issue would add to the "chilling effect" of the change. Such a "chill" is contrary to the protection of civil rights guarantees to all citizens, the avowed goal of civil rights legislation. In contrast, the standard for prevailing defendants enacted in the Fees Act in 1976 was carefully drafted so that "[it] will not deter plaintiffs from seeking relief under these statutes, and yet will prevent their being used for clearly unwarranted harassment purposes."[8] That eminently fair standard should not be amended.

2. Under S. 585, attorney's fee awards would be reduced to the extent to which legal services were provided by an organization funded by the United States or a political subdivision. This provision is squarely aimed at Legal Services Corporation attorneys and legal aid attorneys, and would also affect other organizations like MALDEF which obtain some funding from federal sources. Such organizations would receive reduced fees solely because they are publicly funded. This provision is directly contrary to the intent of the 1976 Fees Act.[9] Moreover, all of the courts that have confronted this issue have held that fee awards cannot be reduced because plaintiffs are represented by public interest attorneys--whether unsalaried or salaried, whether unaffiliated or affiliated with a publicly funded organization.[10]

The policy reasons for awarding full fees to public interest attorneys were cogently articulated in Oldham v. Ehrlich, 617 F. 2d 163 (8th Cir. 1980):

> Legal aid organizations can expand their services to indigent civil rights complaints by virtue of their receipt of attorney's fees. And a defendant sued by a plaintiff retaining legal aid counsel should not be benefited by the fortuity that the plaintiff could not afford private counsel.[11]

It would be a cruel irony if those who advocate the assumption of much of the government's social service burden by private non-profit or charitable organizations were, at the same time, to take away the means to generate such support. Yet in the context of civil rights law, that is what S. 585 proposes. Even with the incentive of contingent fees, "To an extraordinary degree, civil rights plaintiffs are represented by public interest lawyers who do not charge their clients any fees." Larson, Federal Court Awards of Attorney's Fees 99 (Harcourt Brace Jovanovich 1981). The ultimate impact of S. 585 would be to deprive many persons with valid claims of the only attorneys who would consider taking their cases. In summary, the award of fees to public interest attorneys commensurate with those of private attorneys furthers continued protection of constitutional guarantees to the poor by allowing public interest attorneys to take on additional cases because of increased income; while it also deters misconduct by potential defendants by forcing them to pay commensurate costs if they violate the law. It is, moreover, only fair to pay public interest groups the fair value of their services, rather than to penalize them for their eleemosynary vocation and their willingness to forego greater wealth in order to serve the public welfare.

3. S. 585 would further limit "compensation for that part of litigation subsequent to a declined offer of settlement when such offer was as substantially similar to the prevailing party as the relief ultimately awarded by the court." Without any legislation, common sense tells us that no attorney would protract litigation after a good-faith offer of settlement unless he or she believed that a better resolution for the client would be reached

through litigation. The Canons of Ethics of the legal profession mandate that an attorney advocate for his client to the best of his ability. However, whether protracted litigation after a refused offer of settlement will, in fact, result in a better resolution can be known only after refusing such an offer and continuing litigation. Senator Hatch's measure would penalize that attorney who refused an offer of settlement in the honest belief that continued litigation would result in a better resolution for his client, unless the continued litigation did in fact result in better terms for the client. Such a policy will effectively discourage attorneys from litigating after any offer of settlement even though they may believe that better terms can be achieved for their clients. They will be deterred from pursuing their clients' best interests by the threat of a punitive deprivation of any fee award should the judgment not meet their expectations.

4. S.585 also seeks to prohibit attorney's fees where a claim becomes moot due to a change in governmental policy. As is true with other provisions of S.585, this is in direct opposition to the desires of the original framers of the Fees Act.[12]

The provision giving immunity from fee awards if a claim becomes moot due to a change in government policy encourages political entities not to change practices which violate constitutional guarantees until sued, by reducing the economic incentive to eliminate discriminatory practices before they become the object of litigation. Although S.585 would award fees in such instances if the "preponderant reason" for such policy change was the pendency of litigation, that language is a substantial retreat from current law, which would award fees when the suit was a "catalyst" causing review and change of the challenged policy.[13] Under the language of S.585, a lawsuit could be a significant reason for a policy change in a government practice violating constitutional rights, but not the "preponderant" reason, in such a case, the offending entity would be immune from a fee award. The proof problems and prolongation of court cases resulting from the "preponderant reason" standard would be formidable, and highly inconsistent results could be expected. Government entities would be encouraged to disguise or misrepresent their real reasons for many actions.

Even though a governmental entity may correct its illegal practices, it was still the wrongdoer whose misdeeds forced upon its victims the burdens of its wrongs and the expense of challenging them. The immunity provided by S.585 for such entities would give them an unjust windfall at the expense of the victims of their former practices. It would be a cruel irony if the perpetrators of civil rights violations were to benefit from legislation whose purpose is supposedly to assure these rights while the victims would pay to the very end.

5. S.585 states, "[N]o award shall be higher than the prevailing market rate for the particular area. No awards based on contingency factors or multipliers may be made by the court..." The 1976 Fees Act and the explanation in H. Rep. No. 94-1558, supra, at 8, articulate a more flexible approach in establishing attorney's fees. That approach, which has been judiciously utilized by the courts, entitles the prevailing party to "reasonable counsel fees", and leaves their determination to the court's discretion.

The courts have enumerated a number of factors in determining the reasonableness of awards.[14] Prominent among them is the prevailing hourly rate for comparable work by attorneys of similar qualifications, to be awarded for the number of hours actually and reasonably expended in prevailing in the litigation. (There is no record of any pattern of abuse of this "lodestar" standard", or of judges awarding civil rights lawyers more than antitrust or corporate lawyers; the reverse is the usual case.) But that base amount may be adjusted, up or down, in the court's discretion, based on other pertinent factors[15] including the possibility of a contingency factor or multiplier. See cases cited in n. 14, supra. In practice, such a multiplier is infrequently used and most often small in amount.

S.585's prohibition of awards based on contingency factors or multipliers arbitrarity penalizes the civil rights attorney solely because of the type of litigation undertaken. It singles out the civil rights attorney from other attorneys involved in complex federal litigation and deprives civil rights litigants of a fair means to offset some of the most severe deterrents to finding representation. Since civil rights attorneys usually recover no fee unless they win the case, they risk a substantial expenditure of uncompensated time. That risk, in other fields of law, is held to justify enhanced amounts or percentages when recovery is made. Since civil rights plaintiffs usually do not pay for services when rendered, and since cases often last many years, attorneys lucky enough to recover a fee are paid in depreciated dollars, long after the attorneys have met the cost of the overhead associated with the case. Contingency and multiplier factors are designed to give judges discretion to compensate for these burdens in appropriate cases. Their prospect also deters defendants from unduly prolonging litigation as a device for effective reduction of fee liability.

Finally, S.585 mandates that a prevailing party must submit an application for an award of fees within 30 days of final judgment of the action with an itemized statement of expenses.

An order requiring an applicaiton for a fee award be filed after final judgment would apparently preclude interim fee awards. Such awards pendente lite were specifically authorized by Congress in 1976,[16] and the Supreme Court has acknowledged the rationale for interim awards.[17] A rule requiring delay of fee awards in all cases until the entire litigation is concluded would work substantial hardships on plaintiffs and their counsel, and would discourage the institution of actions. Many civil rights cases, especially those involving critical public issues, last for a decade or more. In many cases a plaintiff may substantially prevail, or be adjudicated to have rights which assure that he will prevail, years before a final judgment is rendered. It would be harsh and inequitable to require the plaintiff or his attorney to carry the costs of such litigation for years after the result becomes clear. More importantly, the certainty that no such fees could be sought in any case would make it far harder for civil rights plaintiffs to find representation. Interim fees allow the attorney to maintain financial stability during protracted litigation which may absorb much or all of his time. When one considers the public interest involved and the financial sacrifices undertaken, prohibition of interim fees is a particularly onerous burden for the civil rights attorney.

S.585's requirement that prevailing parties submit an itemized statement of expenses is salutary in that it seeks to ensure that awards accurately reflect time and expenses. However, the courts have ordinarily required such thorough time records and expense accounts.[18] Where these requirements are relaxed, it is for good reason.[19] In all instances it is advisable for attorneys to keep daily time records. Such records ease the process of negotiating a fee award, as well as applying for a court awarded fee. An attorney who does not keep and provide the kind of documentation specified in S.585 is likely to suffer the consequences under current practice. The requirement of S.585 for even more detailed itemization is unnecessary and makes more arduous an already burdensome task. The requirement for submission of fee applications within thirty days is also a needless interference with the discretion and procedure of the district courts. No abuse having been shown, no supposed remedy should be legislated.

Conclusion

The Civil Rights Attorney's Fees Awards Act enables civil rights litigants, "cloaked in the mantle of public interest," to ensure the preservation of individual civil and constitutional rights. The need for an effective Fees Act is as great now as it was in 1976. S.585 would seriously erode the effectiveness of the Act and for that reason alone should be rejected.

The provisions of S.585 are consistently designed to shift the burden of civil rights law enforcement from the perpetrators of violations to their victims. Each of its provisions would clearly have the effect of making civil rights litigation riskier and more unattractive to attorneys, and therefore of making the possibility of legal representation for civil rights victims even more unlikely than it is today. So consistently crafted are the provisions of S.585 to attain these ends, that one can only conclude that its principal motivation is to reduce civil rights enforcement by our citizens and the private bar. Such a reduction would be contrary to national policy at any time, but would be especially unwise and untimely at a moment in our history when government enforcement activities have been brought to a virtual standstill.

This Subcommittee should not report out S.585.

FOOTNOTES

[1] 421 U.S. 240 (1975)

[2] 421 U.S. at 247.

[3] S. Rep. No. 94-1011, 94th Cong., 2d Sess., 1(1976)

[4] S. Rep. No. 94-1011, 94th Cong., 2d Sess., 2(1976)

[5] 122 Cong. Rec. S. 17053, Daily Ed. (Sept. 29, 1976); 122 Cong. Rec. H. 12167, Daily Ed. (Oct. 1, 1976.)

[6] See, *Newman* v. *Piggie Pork Enterprises, Inc.*, 390 U.S. 400, 402 (1968); *S. Report No. 94-1011, supra, p.4.*

[7] H.R. Rep. No. 94-1558, 94th Cong., 2d Sess., 7 (1976); See *Christianburg Garment Co.* v. *EEOC*, 434 U.S. 412 (1978); *Lopez v. Aransas County I.S.D.*, 570 F. 2d 541 (5th Cir. 1978).

[8] H.R. Rep. No. 94-158, 94th Cong., 2d Sess., 7 (1976)

[9] *Id.* at 8 n. 16.

[10] See, Palmigiano v. Garrahy, 616 F.2d 598 (1st Cir. 1980); Carey v. New York Gaslight Club, Inc., 598 F.2d 1253 (2d Cir. 1979), aff'd, 447 U.S. 54 (1980); Rodriguez v. Taylor, 569 F.2d 1231 (3d Cir. 1977), cert. denied, 436 U.S. 913 (1978); Miller v. Carson, 563 F.2d 741 (5th Cir. 1977); Oldham v. Ehrlich, 617 F2d 163 (8th Cir. 1980); Dennis v. Chang, 611 F.2d 1302 (9th Cir. 1980).

[11] 617 F2d at 168.

[12] See, H.R. Rep. No. 94-1558, 94th Cong., 2d Sess., F. (1976)

[13] See, e.g., Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978); Robinson v. Kimbrough, 620 F.2d 468 (5th Cir. 1980); Northcross v. Board of Education of Memphis, 611 F.2d 624 (6th Cir. 1979), cert. denied 447 U.S. 911 (1980).

[14] See, e.g., Johnson v. Georgia Highway Express Co.,Inc., 488 F.2d 714 (5th Cir. 1974); Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3rd Cir. 1973); City of Detroit v. Grinnell Corp., 495 F.2d 448 (2nd Cir. 1974).

[15] Among these factors are: the novelty and difficulty of the questions; the results obtained, the undersirability of the case or its impact on the attorney's practice.

[16] See, S. Rep. No. 94-1011, supra, at 5; H.R. Rep. No. 94-1558, supra, at 8.

[17] See Bradley v. School Board of City of Richmond, 416 U.S. 696, 723 (1974)

[18] See, Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980) (en banc).

[19] See, Harkless v. Sweeney, 608 F.2d 594 (5th Cir. 1979).

Senator DeConcini. Congressman Drinan, we welcome you here to the Senate Judiciary Committee, a friendly face and a scholar and someone who, I think, has had as much as anyone in the Congress to do with a number of civil rights areas and certainly the criminal code. We miss you in that effort that you put forth for so many years. I do not know if we can ever succeed in getting as far along as we did when you were there, but we are still laboring away, as you know. We certainly welcome you here today.

STATEMENT OF ROBERT F. DRINAN

Mr. Drinan. Thank you very much, Senator. I am very pleased to be here.

I was asked by the Leadership Conference and the Alliance for Justice to testify because I was the floor manager of this bill in the House when it passed. I have before me here the report where we very carefully tailored what is in this bill and what, in our judgment, has worked very well.

Senator, the Alliance for Justice is a national association of public interest and civil rights organizations whose purpose is to help ensure that adequate legal representation is available to groups and individuals who lack those resources. The Leadership Conference, as you know, Senator, is a coalition of 163 national civil rights, labor, religious, and civic organizations dedicated to the achievement of equal opportunity and the advancement of civil rights.

The Leadership Conference has made a solemn judgment that they are opposed to this bill in this form. They will proclaim that to the country. In the judgment of the Leadership Conference, which is the broad umbrella group of all of the civil rights and all of the civil liberties groups in this country, they solemnly announce today that adoption of these amendments would have a significant adverse impact on both the ability of victims of civil rights violations to obtain legal representation and on the enforcement of their constitutional and statutory rights in a wide variety of circumstances.

Senator, I have read the testimony that will be following this panel. It is the attorneys general and the municipal lawyers. It is understandable how they feel required to represent their constituents, but I think we should go back to the basics and recognize that this was a bill that was designed to allow private citizens to act in the capacity, if you will, of attorneys general. The House and the Senate together left few matters unexamined in the extensive consideration. They put together a bill which brought civil rights into the area where a hundred similar fee-shifting statutes exist. In the area of civil rights we said at that time and the Congress solemnly ratified and President Ford signed the bill saying that finally we want to allow those who operate on the plaintiff side to recover if they prevail reasonable fees in the discretion of the judge.

Senator, I think this is the sentiment of the Leadership Conference and the civil rights community, there is an old, tired cliche: if it ain't broke, don't fix it. In our judgment, there is really no evidence that the fundamental purpose of this bill is not being carried out very well.

Senator, the Attorneys' Fees Act explicitly adopted the concept of the Supreme Court decision *Newman v. Piggie Park Enterprises.* We said that the award of a reasonable attorney's fee was designed for the purpose of giving civil rights plaintiffs effective access to the judicial process. The Congress explicitly ratified that concept.

Senator, I think that this bill has even more meaning now than it did several years ago when it became the law of the land. In these days of intense pressure on the Federal budget, there is simply not enough personnel or time or resources for government to enforce the laws on its own. This law said that we encourage a vigorous free market in which private-sector lawyers and not government can play a major role in enforcement. If you will, Senator, in this area the civil rights community believes in free enterprise.

I have a long testimony here, Senator, which I, with your permission, will submit as a part of the record.

Senator DECONCINI. Without objection, it will appear in the record.

Mr. DRINAN. I will not go through the six points. Some of them on the subsections (a) through (f), some of the them have been covered by the excellent testimony previous to this. All I can say, Senator, is that to enact any type of modification of the original very carefully modified plan would have a chilling effect upon the primary purpose of the Fees Act, namely to encourage private citizens to take responsibility for the vindication of their own constitutional and civil rights.

In the testimony that will be given after this panel, one of the witnesses says this: There can be no argument that the awards of over such a sum in those cases encourage qualified counsel to bring lawsuits which would not otherwise have been brought, which is the stated purpose of the Attorney's Fees Act.

So, if some towns and cities have to pay awards, that is the whole purpose of this act, to allow people who otherwise would not have representation to go there with a lawyer who will take it. If he does in fact prevail after much travail, he will get only reasonable fees. It is not automatic. It is in the discretion of the judge. To qualify that purpose means that you are cutting away at something very, very fundamental, namely access to the courts. In this day, when the Legal Services Corporation is being sharply curtailed, I think that is one more reason why the civil rights attorney's fees is very, very important.

The leadership conference and the alliance oppose subsection a and subsection b. They have qualifications which are in my testimony about the apparent or real conflict of interest mentioned by the previous witnesses.

Senator, let me just conclude by saying that I hope that the proposed amendments do not become law. I find a lack of hard information about the actual operation of this law. I hear about the successes. I follow the decisional law on it very carefully. But, frankly, I think that what the Congress needs before it acts at all is a vast survey by the GAO or some other organization, a statistical analysis of the fee awards and who pays them and how many defendants feel that they were cheated, how is this operating across the land. And I do not think that the Senate or the Congress should just be responsive to one particular area of the legal profession.

The alliance and the leadership conference support this committee's commitment to maintaining the ability of citizens to vindicate their civil rights by means of the access to the legal system that this bill provides.

Although the Fees Act is still in its infancy and there is no systematic quantified evidence about its implementation, our impression is that the act does allow citizens in their private capacity as private attorneys general to enforce the laws on their own without turning to the Government.

Senator, the leadership conference and the alliance would be very happy to cooperate with the committee in any way possible as it continues its task of oversight and examination of this important legislation. Thank you very much.

Senator DECONCINI. Father Drinan, thank you for your fine testimony. We have had a chance to review some of it. My interest here is not to overhaul it dramatically but to consider fine tuning. You may be right; maybe it does not need any fixing. I am always one who is trying to make things work better, and maybe that does not apply here.

Your testimony discusses the intense pressure on the Federal Government in terms of money and personnel and the effect this pressure exerts on the ability of the Government to enforce the law on its own. With or without the New Federalism, is it not true that local governments are subject to the same intense financial pressures? Should not we amend the Fees Act to bring a little more flexibility of action and security to local governments by discouraging frivolous and harassing lawsuits by encouraging settlements and by making the computation of fees based more on actual expenses?

Mr. DRINAN. Senator, you have several issues in that one question.

Senator DECONCINI. Right.

Mr. DRINAN. To answer the question I have to go back over all of the testimony. All I say is I do not think that they have made out the case. They are asking what I conceive to be a fundamental reordering of the architecture of this particular bill. They are saying that defendants who are municipalities do not have to pay in certain circumstances. I think it is up to the judge. There is wide discretion. I do not see the need at this time for a fundamental alteration of the metaphysics, if you will, of the bill.

Senator DECONCINI. Father Drinan, the standard in the bill here sets forth: attorney's fees shall be awarded to the prevailing defendant if the court finds that the plaintiff's claim was frivolous, unreasonable, or groundless or that the plaintiff continued to litigate after it clearly became so even though there was no subjective bad faith.

Do you find a problem with the words frivolous, reasonable, or groundless?

Mr. DRINAN. I find a problem in the fundamental assumption that plaintiffs are doing this. Plaintiffs are not bringing frivolous suits, as the testimony here showed. I followed this very intensely. There is virtually no frivolous suits being brought. The assumption there is that this is a serious problem, and I do not think it is.

Senator DECONCINI. Let us say it is not a serious problem, for purposes of discussion. What objection would there be to have a standard that, if it became a problem, serious or not, that a frivolous, unreasonable, or groundless suit was brought?

Mr. DRINAN. Well, I have faith in the judges. If a suit is frivolous, it dies at the first moment. It dies in pretrial. So, I do not think that frivolous suits get along this way. I do not think that plaintiffs' attorneys in civil rights cases are harassing defendants or municipalities or attorneys general.

Senator DECONCINI. I do not know that they are. In my practice of law I have seen many frivolous suits brought, and some of them go a long way. Quite frankly, in my judgment, they should never have been submitted to the jury. But at times they are.

Mr. DRINAN. If I may interrupt, they are probably brought by some lawyer who is getting very, very good money for every billable hour that he spends on this thing, and it may be frivolous.

Senator DECONCINI. I do not know.

Mr. DRINAN. I do not concede the same situation in a civil rights case, where a careful lawyer takes one case where he could have taken others. He knows it is risky for him. He is not going to take a frivolous case when his compensation is so uncertain.

Senator DECONCINI. Ms. Hernandez, let me ask you a question. In the experience of the Mexican American legal defense and education fund, your statement states that you are inundated with complaints. I have not seen your whole statement; maybe it sets down the figures. Is there a fear from MALDEF's point of view that maybe attorney's fees would be awarded against your clients and thereby discourage them from coming to you? Is that the thrust of your objection?

Ms. HERNANDEZ. There are several objections. They address various perspectives. First, presently we cannot even take 1 percent of the cases that come to us. As you know, we are nationwide. Sometimes many people feel or have the impression that there are many soldiers out there, but the totality of MALDEF is less than 20 lawyers for the country. We have to be very selective about the cases that we bring.

Here in the D.C. office, which is the office that I am most familiar with, we take no cases whatsoever. We have to refer the individuals to attorneys who are willing to take these type of cases. Fewer and fewer attorneys are becoming available to take cases even when the cases have merit.

In our situation, MALDEF specifically, it is not just determining whether a case has merit but the implications, the far-reaching impact that this will have on our community. Even when we decide that the case meets that criterion, we then have to decide how to best allocate our attorney resources. None of our clients have any money. We take the case and there are no fees discussion whatsoever.

The second rationale for not taking cases even if they meet the standards is because, once again, we have to be very careful how we allocate our resources. Even in the cases where we receive attorney's fees, and they constitute less than 5 percent of our annual total budget. As you can see, it is a very small amount. But even in those cases, the amounts awarded to MALDEF are very small.

Our fear is twofold. First, with the closing of Legal Services, more clients are flooding our offices. We are unable to, serve them. Second, the pool of private attorneys that take these types of cases is getting smaller. We have not seen any abuse. We do not see the basis for the fear by municipalities, by governmental entities. We know that in MALDEF's situation, the taking of a case by MALDEF is a very serious concern and decision.

Senator DECONCINI. I can appreciate that. I guess where I am having more problem today than I thought I would, the provisions here about settlement and what have you, some good arguments have been made. The area of setting forth these three standards: frivolous, unreasonable, and groundless—I have a hard time seeing how that can be of any problem to you. First, you do not take any cases that are even close to having that standard. So, if it were set out as a standard here, I really cannot see any great problem versus bad faith or good faith.

Ms. HERNANDEZ. Senator, if you look on page 6 of my written testimony, you have advocated the adoption of that standard, we would have no problems with it.

Senator DECONCINI. OK. Well, that is what I wanted to find out. Thank you. And I appreciate what your testimony says.

Mr. BRADLEY. Senator, might I say just a short comment?

Senator DECONCINI. I am going to get to you in just a minute. I am going to ask you almost the same question.

Let me just ask you, Mr. Farrington, regarding subsection (e) of S. 585, if you could address that——

Mr. **Farrington**. I do not have a copy. Just tell me what it——

Senator **DeConcini**. Section (e) of S. 585 would preclude the use of multipliers and contingency factors in computing fees awarded under 1988. Your testimony suggests that the use of multipliers should be continued because of the complexity of litigation under 1983——

Mr. **Farrington**. No, sir, not because of the complexity—because of the economic realities of the difference in plaintiffs' practice and defendants' practice.

Senator **DeConcini**. Let me just pursue this a minute. The litigation under 1983 and because civil rights attorneys receive no fee unless the plaintiff wins the case, should municipality A have to pay more than the expenses actually incurred in the lawsuit against it because lawsuits against a municipality, B, and State C, or other governmental entities, X, Y, Z, were unsuccessful? Why should it matter in determining fees that a certain percentage of these cases are successful?

Mr. **Farrington**. As a practical matter, Senator, they do not. The multipliers, very few courts award them anyway.

Senator **DeConcini**. You mean the multipliers?

Mr. **Farrington**. The multipliers.

The sixth circuit takes the approach that—which I sort of like—it is sort of foolish to talk about multipliers. What you are really looking at is a reasonable fee for taking this case. If you do not get payment until the end of the litigation and if you take two of them, there is a likelihood that you win, if you are not going to win, a reasonable fee takes that into account. But that makes it higher than the fee of the lawyer who gets paid monthly.

Senator **DeConcini**. I see what you mean.

Mr. **Farrington**. The highest multiplier that I have seen in my area of the country is 35 percent, and that is after 3 or 4 years of litigation. The cities had the use of the money all of that time. In reality, it does not work out to much of anything; but, if you take away the right to argue it and the right to say to the court: Look, Judge, I have been turning down cases for the last 4 years trying to get this case to fruition and now I am here. If you pay me $60 an hour today for the time I could have spent $60 an hour 4 years ago, I am falling way behind. In the meantime, the city has had the use of that money.

Senator **DeConcini**. Yes, it is a good point.

The Senate report in 1976, Mr. Bradley, explains the adoption of a dual standard under 1988 by saying that plaintiffs, "should not be deterred from bringing good-faith actions to vindicate the fundamental right here involved by the prospects of having to pay their opponents' counsel fees should they lose."

Do you think that S. 585 standard, that the defendant can be awarded attorney's fees if the plaintiff's claims are frivolous, unreasonable, or groundless, is inconsistent with the rationale in the Senate report of 1976?

Mr. **Bradley**. Well, I certainly think it is a change to a degree. I think it makes a vast difference. The problem might be that frivolous and unreasonable sound like reasonable words, but let me give you an example. I can guarantee when a client talks to me and I explain what his or her liabilities are, I can guarantee them that the case will not be litigated in bad faith because that is under my control. But I cannot guarantee them that a court will not find the lawsuit frivolous or unreasonable.

In one case I have been involved in one of the issues was a man was denied a ballot because he refused to address the election official by the title "sir". Now, all the court had to do was make a credibility choice against my client and say that did not happen, and your whole lawsuit——

Senator **DeConcini**. Let me ask you this: Do you think that an individual could bring a frivolous, unreasonable, and groundless action in good faith?

Mr. **Bradley**. Certainly.

Senator **DeConcini**. You do?

Mr. **Bradley**. Yes, because there are reasons for bringing lawsuits, other than the expectation of winning a final judgment in court.

Senator **DeConcini**. All suits can be justified either in good faith or bad faith?

Mr. **Bradley**. Well, they can be classified that way.

Senator **DeConcini**. In your standard, when you are making a decision, can every suit be classified either in good faith or in bad faith, the filing of the suit?

Mr. **Bradley**. I suppose they can. I mean, you do not do that because there is no question about whether or not they are good faith or bad faith most of the time. The presumption is you have to make a finding of bad faith, which is a hard thing to do.

But, yes, you can divide them that way, but the courts just do not raise the issues. People do not raise the issues.

A judge can find things that are frivolous. A court can find something that is frivolous in a changing area of law that you entirely disagree with and you gave good-faith advice to your client as a sound issue, and the court will disagree with you. Just based on credibility is one example.

Senator **DeConcini**. Thank you, ladies and gentlemen. We will now have the panel of Mr. George Renner, mayor of Glendale, Ariz.; Mr. Leroy Zimmerman; Mr. James Brennan; and Mr. Tom Burns.

We are glad to have Senator Specter here. We will first hear from Senator Specter. Then, due to airline schedules, we will hear from our good friend George Renner.

STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator **Specter**. Thank you very much, Mr. Chairman. It is a great pleasure for me to appear today beside a friend and colleague of long standing.

As the protocol of the Senate has it, the only thing which takes precedence over airline schedules is Senators' introductory statements. This is a special pleasure because Hon. Leroy Zimmerman became a public prosecutor a short time before either you or I did, Mr. Chairman. My advent to the ranks as a district attorney was in January of 1966. District Attorney Zimmerman took that very important position in Dauphin County in the preceding year, 1965, at the tender age of 29. Dauphin County is one of the largest and most active counties in Pennsylvania, the situs at that time of the Commonwealth Court and a very, very busy county indeed.

I have worked with Roy Zimmerman over the course of the past 17 years in the work of the prosecutor. Leroy Zimmerman was a unique and outstanding prosecuting attorney in Dauphin County, handling the wide range of the most complex matters on organized crime, violent crime, governmental corruption; he had it all in Dauphin County. He became president of the Pennsylvania District Attorneys Association and served there with great distinction. He was a member of the Criminal Rules Committee of the Pennsylvania Supreme Court. The only bad part about that service was that he replaced me on that committee, on my involuntary departure from those ranks.

Leroy Zimmerman ran successfully last year for the office of State attorney general, a position which he now holds with great distinction. He is the first of Pennsylvania's elected attorneys general. I think it may be a long while, should he seek to continue in that position, before there is a second attorney general of the Commonwealth of Pennsylvania.

He has served on the Federal State Prosecutorial Task Force of the National Association of Attorneys General and on the Board of Trustees of Dickinson School of Law.

He is a man with really great insight into the practical aspect of the legal profession, of law enforcement and of public service. I believe that his tenure as attorney general of Pennsylvania is just another of the milestones of his political and professional career because I think the sky is the limit for Attorney General Zimmerman.

It is a great pleasure for me to be here to present him to the committee.

Mr. ZIMMERMAN. Thank you, Senator Specter.

Senator DECONCINI. Senator Specter, thank you. It is nice to know that we prosecutors always stick together. I am glad to have you here.

Senator SPECTER. Especially when the facts are on our side.

Senator DECONCINI. That is right. I am glad to have you here, Mr. Zimmerman. Thank you, Senator Specter, for taking the time to be here and introduce the attorney general of Pennsylvania.

Mr. Attorney General, if you do not mind, we have a mayor here from one of the great cities in Arizona, who has an airplane to catch. I promised that we would accommodate him. We are very pleased to have Hon. George Renner, the mayor of Glendale, here. George, we know of some of the fine work and the problems you have had in civil rights litigation in your city, attempting to stem the spread of pornography. We compliment you for that——

Mayor Renner. Thank you, Senator.

Senator DECONCINI. Of awards that you have had and commendations for your straightforwardness and willingness to stand by in very difficult times. So, we welcome you here and wait for your testimony.

STATEMENTS OF A PANEL CONSISTING OF HON. GEORGE RENNER, MAYOR, GLENDALE, ARIZ.; LEROY S. ZIMMERMAN, ATTORNEY GENERAL, THE STATE OF PENNSYLVANIA, ACCOMPANIED BY MALACHY R. MURPHY, DEPUTY ATTORNEY GENERAL, THE STATE OF WASHINGTON; JAMES B. BRENNAN, PRESIDENT, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS; AND TOM BURNS, VICE MAYOR, CHANDLER, ARIZ.

Mayor RENNER. Thank you, Senator DeConcini. I must confess I feel somewhat like the only Cub Scout at a Girl Scout picnic today, being, I think, probably the only nonlawyer who is appearing.

My name is George Renner. I am mayor of the city of Glendale, Ariz., a community of over 100,000 people just west of Phoenix in the glorious Valley of the Sun.

I would like to thank you for this opportunity to appear today and to speak in support of Senator Hatch's amendment and in general support of Senate bill 585.

I will not try to lecture or persuade you on the meaning, as others have and, I am sure, others will, of interpretations of recent State and Federal cases that have dealt with sections 1983 and 1988. Rather, I would like briefly to relate to you my personal introduction to section 1983 and the effects and breadth of possible judicial interpretation of section 1988. After 4 years as a Glendale City councilman, I first ran for the office of mayor early in 1980. During that campaign, the issue of control of three adult bookstores and one adult theater in my community arose. I pledged along with those councilmen seeking office that we would do anything within our power to see what legal remedies were available to the city.

The possession for sale of obscene material is a felony, as you well know, Senator, in the State of Arizona. Unfortunately, for various reasons the county attorney's office at the time did not have obscenity prosecution as a higher priority. There had been no criminal action taken.

In December of 1980 I, along with my six fellow councilmen, directed our city attorney to report to us on the alternatives regarding a civil lawsuit against the bookstores and the adult theater. After considerable research and investigation on his part, he appeared before us and indicated he desired to file a civil suit known as a nuisance abatement action under a series of statutes enacted by the Arizona State Legislature in 1975. By a vote of 7 to 0, we authorized him to file that suit in the Superior Court of Maricopa County. That suit, after what I personally feel was an unfortunate and unjust decision, is now on appeal before the Arizona Court of Appeals.

The attorney has informed me that because of that I must limit my remarks to the uncontested facts of record because of that action.

I think you, Senator, have some understanding of that suit because of our prior discussion. But let me briefly say it named over 30 individuals and corporations who either owned or operated the 4 businesses in question. The suit asked for an ex parte restraining order, which until that time I had no understanding of the meaning of an ex parte restraining order. Now I do.

As you know, the order is a temporary one signed by a judge upon the strength of affidavits and documents filed with him, without giving the other party an opportunity to be heard. Its usual purpose is to preserve the status quo until all parties can be present in the court. The order signed by the judge directed the defendants not to remove or interfere with 18 specific books, films, and cassettes in their possession for a period of 10 days.

Again I must stress this was a civil lawsuit. A Glendale police officer had purchased 1 copy each of the 18 items in question. We were asking the court to temporarily restrain the removal of all other copies of the 18 items that the defendants had. No one was arrested. No search warrant was issued. No property was taken. No store or theater was closed.

The restraining order tracked word for word the State statute. It was issued June 10, 1981, and was to be good for only 10 days. .

The reaction of the main defendants was swift. A counterclaim was filed against the city of Glendale, the city attorney in his official capacity, and George Renner individually and in my official capacity as mayor. That counterclaim alleged under section 1983 that we had acted under color of State law to deprive the bookstores of their rights under the 1 and 14 amendments and, of course, asked for damages and attorney's fees pursuant to section 1988.

Unfortunately, at this point things took a decided turn for the worse. In rapid succession' the judge who signed the restraining order quashed it on the basis of vagueness. Several days later, the judge found the entire statute that our action had been filed under unconstitutional. He granted the defendants' motion to dismiss, leaving only the counterclaim before the court.

Our attorney was able to show the court that the original order had been violated by the defendant when one of the stores sold one of the items to a Glendale undercover police officer before the order had been quashed. That fact had little if any bearing on the court, which then proceeded to grant the defendant summary judgment in the amount of $1 nominal damages and $7,000 attorney's fees.

I would quickly point out that, although I personally find the court's decision unfair, the amount is not of national proportion nor concern. The city of Glendale will survive and continue to grow whether or not the decision is reversed. Rather, though, of national concern is the way in which section 1983 and 1988, the question of fees, are being used to cripple local government. My only act, Senator, was to vote yes along with six councilmen to authorize the filing of a civil lawsuit. Yet, a judge found that sufficient action under color of State law. My crime, as it were, was that I was unable along with my fellow councilmen and our city attorney to accurately predict a future event, that event being that the judge would find the State statute unconstitutional.

Our problem does not end here. We are forced again to put our personal and official pocketbooks on the line, when the council voted seven to zero to appeal the decision. That vote, I might add, is heavily weighed in discussions with the council, Senator. We feel that a principle is involved here that mandates us to pursue this issue. Obviously, if we guess wrong again, there could be additional assessments under section 1988 for attorney's fees.

Senator, our actions were not a plot or conspiracy to deprive any individual or minority of their right to vote or benefits in our society. We acted in good faith without malice to carry out the wishes of the citizens of Glendale. We voted to file a civil lawsuit. In so doing, we became liable under section 1983 and 1988.

If I may, I would like to ask your patience in indulging me for just a few more minutes while I give you a bit of my personal background. I am 35 years old and extremely proud of the fact that just last month over 85 percent of the voters in the city of Glendale returned me for my second term as mayor.

I served in Vietnam as an officer in the U.S. Army. I am married and have two children and work in a real estate and insurance family business within the city of Glendale. In my life, Senator, I have faced confrontation and difficult situations. I have made decisions under pressure and in the face of time deadlines.

I can honestly tell you that the effects of section 1983 and its associate 1988 fees on local government scares me. It scares me personally, and it scares me for the future of the cities not just in Arizona but in this country.

I ask you to place yourself in our position. What if, as a Senator, you could be held personally liable should a court rule that you had violated some civil right in actions that the Congress of the United States possibly could take? I doubt, Senator, your decisions would be as bold and as timely as they are now if you had to carry the burden of future anticipation in front of you every time you deliberated.

In addition, I fear that the continuance of sections 1983 and 1988 awards will deter qualified and interested people from participating in municipal government as either elected officials or as appointed officials. Unless Congress acts to relieve this burden, all local government can and, I fear, will eventually come to a halt buried in a sea of judgments and lawsuits.

I am proud to say that I support the efforts of our President to return many programs to the State and local level. I share the concern of my fellow mayors that funds must accompany these programs, but I also wonder what the effect of this return will be if section 1983 and 1988 are allowed to continue in their present form. Will every vote I take be the beginning of a lawsuit? Will every potential rule and regulation passed be an opportunity to face personal bankruptcy in addition to placing the financial integrity of the city of Glendale on the line?

I certainly hope not and I pray not.

In conclusion, Senator, I urge you to use the courage and wisdom you are so well known for in our home State to see that this amendment to Senate bill 585 is passed by the entire Congress so that we can proceed with the business at hand, solve the problems that face this country, and do so with a more-than-even chance of survival for the cities. Thank you, Senator.

Senator DECONCINI. Mayor Renner, thank you. I wish you would express to the council of Glendale, Ariz., and I express to you thanks for coming this distance to testify to bring before this committee an actual problem that you have had to address both personally and professionally as well as the city. We thank all of you for taking the position and not caving in under difficult circumstances, as you have proven you are not about to, and obviously the citizens of that part of our State and, I think, our whole State have demonstrated that recently, as you pointed out.

Mayor RENNER. Thank you, Senator.

Senator DECONCINI. Thank you. If you need to leave, we understand.

Mayor RENNER. Thank you very much. I apologize I will not be here to participate in any questions and answers. Again, thank you for the opportunity to be here.

Senator DECONCINI. Attorney General Zimmerman, thank you for your courtesies. If you care to proceed with a statement, if you have a formal, long statement, we will put it in the record. You can proceed to summarize it or review it if you care to.

STATEMENT OF LEROY S. ZIMMERMAN

Mr. ZIMMERMAN. Thank you, Senator, for this opportunity to join the other members of the National Association of Attorneys General in support of Senate bills 584 and 585.

Before I highlight and summarize what I have to say here today, I would like on the record to express my personal appreciation to Senator Arlen Specter, our distinguished Senator from Pennsylvania, for his taking time to be here today.

Attorneys general who have preceded me in testimony before this subcommittee have discussed the historical development of lawsuits under section 1983. They have also described the general application of section 1988 in those lawsuits. I will not duplicate their comments but, instead, will focus on specific problems experienced by the Commonwealth of Pennsylvania which I believe will highlight the necessity for such remedial legislation.

In this regard, let me say that I fully support the National Association of Attorneys General in urging the passage of Senate bills 584 and 585, as well as Senator Hatch's proposed amendments to Senate bill 585. Directing my comments to those amendments, it is my belief that the Attorney's Fees Act was not intended to encourage Federal court litigation of State law claims. Accordingly, as provided in subsection 722A subsection b of the proposed amendments to Senate bill 585, litigants should be prohibited from asserting State law claims as Federal civil rights actions for the primary purpose of collecting attorney's fees under section 1988. Similarly, counsel for a plaintiff who rejects a settlement offer which is as favorable as a later judgment should not collect attorney's fees on the prevailing party theory for any litigation undertaken because of the rejection of the settlement. This philosophy is reflected in subsection 722A subsection c of the proposed amendments.

I believe, however, that the proposed legislation could go farther in protecting the fiscal integrity of the States' budgetary responsibilities.

Essentially, we can perceive four problem areas. The first and perhaps the most serious from a legal standpoint is the case where substantial attorney's fees are awarded notwithstanding the fact that a plaintiff has been denied damages because the defendants were found to have acted in the good faith belief that their actions were proper.

In *Skehan* v. *Board of Trustees of Bloomsburg State College*, a 10-year-old civil rights case with too many published opinions to list here, a nontenured college professor alleged that he had been terminated without due process and for reasons violative of his first amendment rights. Eventually, the Federal court rejected his first amendment claims but found he had been terminated without hearings required by his employment contract. The court ordered he be reinstated in a suspended-with-pay status pending a hearing on his termination. Pursuant to the court's order, a hearing was held before the professor's peers, and his termination was found to have been justified. He was terminated again.

During the pendency of the hearing, while on suspended status, the plaintiff received less than $25,000. The court refused to award back pay dating to his original termination on the grounds that the individual defendants had acted in good faith. His attorneys requested over $150,000 and received $50,000 from the Commonwealth of Pennsylvania as a result of various court orders and settlements throughout the litigation.

The *Skehan* case illustrates at least two problems. First, the Commonwealth essentially won this case. The plaintiff collected only an insignificant fraction of the amount of money he sought. Yet, Pennsylvania was required to pay twice the amount, $50,000, to the plaintiff's attorneys.

While courts have recognized that important public interests are served by protecting public officials from liability for damages when they act in good faith, there is no similar protection from the assessment of attorney's fees. In this regard, the Supreme Court has identified several important policy considerations supporting this immunity from money damages, including the danger that the threat of such liability would deter public officials from executing their duties with the decisiveness and judgment required by the public good. *Scheuer* v. *Rhodes*, a 1973 case, is cited for that principle in my prepared statement.

This same consideration requires that a public official and the States have limited liability for attorney's fees.

To the extent that those fees might have to be paid by the official, the deterrent effect is obvious. The imposition of attorney's fees on the State rather than the individual is equally harmful. Any responsible, conscientious public official will be substantially affected by the threat that his or her decisions, if erroneous, might result in the imposition of substantial financial liability on his or her public agency. That threat, like the threat of personal liability, serves to deter decisionmaking and forceful action by such public officials.

Another serious fiscal problem faced by States is created by those cases in which a plaintiff brings a lawsuit seeking to compel certain defendants to take specified actions. Even though defendants have taken voluntary action, the courts have been awarding attorney's fees to plaintiffs on the theory that the lawsuit was the catalyst for the defendants' initiatives. See *Ross* v. *Horn*, a third circuit case in 1979.

This theory is not always sound. Frequently, defendants take such initiatives, not because they believe they are legally required and may be ordered by the court, but because they recognize the desirability of change for social or economic reasons.

The fallacy of the theory is that it destroys any incentive to make change because the pendency of a civil rights action could substantially increase the original costs of doing that which the lawsuit seeks to compel.

This problem of costs is exacerbated by legal and ethical restraints on the negotiation of attorney's fees awards in conjunction with the merits of the case. For example, at least one State has apparently barred defendants on ethical grounds from negotiating attorney's fees with the merits of the case. Committee on Professional and Judicial Ethics of New York City Bar Association, opinion No. 80-94, September 20, 1981. Several courts have found such settlements to be barred by the Attorneys' Fees Act itself. See *Prandini* v. *National Tea Company,* 557 Federal 2d 1015, a third circuit opinion in 1977; and *Regalado* v. *Johnson,* an Illinois decision reported in 1978. Thus, defendants must consider settlement of litigation without knowing the final cost. Indeed, a case which a State has essentially won, without judgment, through litigation, may settle at a cost favorable to the State but require an attorney's fee award far out of proportion to the relief.

One request for attorney's fees is pending in *Institutionalized Juveniles* v. *Secretary of Public Welfare of Pennsylvania,* a case in which the plaintiffs sought to enjoin the Commonwealth of Pennsylvania to institute extensive hearing procedures prior to the admission of juveniles to institutions for the mentally ill and mentally retarded. Twice the U.S. Supreme Court rejected lower court orders requiring the State to hold the hearings requested by the plaintiffs. *Kremens* v. *Bartley,* 431 U.S. 119; *Institutionalized Juveniles* v. *Secretary of Public Welfare.* Indeed, the U.S. Supreme Court specifically approved Pennsylvania's procedures.

Nonetheless, on remand, the plaintiffs' counsel is seeking extensive fees. Several years after the lawsuit has commenced, the Pennsylvania Legislature, a nonparty to the action, modified some of the procedures at issue in the lawsuit. Plaintiffs' counsel now claims the legislative modifications granted part of the relief requested by the plaintiffs.

Ironically, plaintiffs' counsel challenged the legislative modifications as being totally inadequate. An award of attorney's fees to plaintiffs' counsel under the facts of this case clearly establishes the need for remedial legislation.

Senator Hatch's proposed amendments, insofar as they provide that voluntary action by defendants can be a basis for attorney's fees only when the preponderant reason for such action is the pendency of litigation, would partially meet that factual situation.

Other concerns remain. When district court orders, subsequently held to be invalid, remain in effect during the pendency of an appeal, the litigation will have benefited the plaintiffs. Such litigation would, therefore, arguably provide a basis for an award of attorney's fees, even though the defendants had ultimately prevailed. Just such a situation is presented by the case of *Halderman* v. *Pennhurst State School and Hospital,* 612 F.2nd 84, a Third Circuit Court of Appeals case.

The district court found that the U.S. Constitution and various Federal and State laws required the Commonwealth of Pennsylvania to close Pennhurst Center for the Mentally Retarded, a State institution, and relocate the residents to community facilities. The U.S. Court of Appeals for the Third Circuit essentially affirmed the district court's order but did so on very limited grounds, substantially different than those relied on by the district court. The U.S. Supreme Court disagreed with the court of appeals but did not reach most of the issues decided by the district court. Instead, the U.S. Supreme Court remanded to the court of appeals for a decision on those issues, citing *Halderman* v. *Pennhurst State School and Hospital*, 451 U.S. 1, 1981.

The district court orders, dating from early 1978, required that the defendants improve conditions at Pennhurst and, at the same time, move residents into the community. While neither the court of appeals nor the U.S. Supreme Court has adopted or approved any part of the district court's analysis, that court's orders have remained in effect for over 4 years. Meanwhile, conditions at Pennhurst have indisputably improved, and many residents have been moved into the community. The plaintiffs have received some of the relief they requested.

Ultimately, Pennsylvania may very well be correct in its claim that the improvements at Pennhurst were not required by law. Since conditions at Pennhurst now comply with the district court orders, the propriety of these orders is now essentially a moot issue.

Pennsylvania will probably prevail in its claim that the movement of residents from Pennhurst into the community is not legally required. Yet, hundreds of residents will have been moved by then. The question then is whether Pennsylvania should be responsible to the plaintiffs for attorney's fees related to obtaining a district court judgment which was later ruled invalid but which benefited the plaintiffs prior to its reversal. Senator Hatch's proposed amendment would clearly require the answer to be "No."

A major fiscal problem to the States is created by the award of counsel fees to publicly funded legal services organizations. For example, in the 1979-80 fiscal year, the Pennsylvania legislature appropriated slightly over $2 million to legal services associations. In that same year, legal services associations were awarded over $275,000 in attorney's fees in litigation brought against the Commonwealth and its officials. I cite *Bolden* v. *Pennsylvania State Police*, 491 F. Supp. 958, a 1980 case in the eastern district of Pennsylvania, where the counsel fees involved were over $150,000; *Vecchione* v. *Wohlgemuth*, 481 F. Supp. 776, in the eastern district of Pennsylvania in 1979, where the counsel fees were over $110,000. Such awards serve no public purpose and wreak havoc upon the State's budget planning process.

In pursuing civil rights actions against State officials, the legal services organizations are doing exactly what the State and Federal governments are already paying them to do. I ask why should they be paid twice? Indeed, all but one of the cases in which legal services organizations recovered fees from the Commonwealth of Pennsylvania in the 1979-80 fiscal year were commenced prior to the enactment of the Attorneys' Fees Act in 1976. There can be no argument that the awards of over $275,000 in those cases encouraged qualified counsel to bring lawsuits which would not otherwise have been brought, obviously because they were brought, three of the four cases, before the enactment of the Fees Act.

The Pennsylvania Legislature, as well as other State lawmaking bodies, cannot anticipate such awards, and funds for their payment must be diverted from necessary governmental functions. The inability to anticipate for budgetary purposes always is onerous to State legislatures but is manifestly unfair when the awards are made to legal services organizations already funded by public moneys. This double-dipping must be stopped by the Congress.

In closing, I again note my full support for Senate bills 584 and 585 and Senator Hatch's proposed amendments. I also respectfully urge the subcommittee to reconsider in depth the entire matter of attorney's fees and specifically to consider the problems I have described here today. Thank you, Senator.

Senator DECONCINI. Thank you, Mr. Attorney General. Before questions, we will go on with the other witnesses. Mr. Brennan?

STATEMENT OF JIM B. BRENNAN

Mr. BRENNAN. Thank you, Senator DeConcini. I want to commend you on your rapt and terrific attention here this afternoon. Don't quit now.

My name is Jim Brennan. I am the president of the National Institute of Municipal Law Officers. I am the city attorney for Milwaukee, Wis.

I want to thank you for being here. It is my ernest wish that I will be helpful to the committee in their deliberations.

I have two statements—one that I will introduce and another that I would also like to be introduced concerning the catalyst question.

Senator DECONCINI. They will both appear in the record, without objection.

Mr. BRENNAN. The relationship of award to fee is what we are discussing here. It seems to me that we have the tail wagging the dog. We cannot, as attorneys, assess a case when we have to be more concerned with the actual attorney fee than we do in evaluation, true evaluation, of the case. That is why I emphasize NIMLO's position; namely, get your fee out of your award.

I am very much interested and encouraged by the amendment that discusses some type of offer of judgment. I think that would be very helpful to stop the tail from wagging the dog.

I have two points—one general—that I would like to make. We are concerned here, and the first panel was concerned, with plaintiffs getting into court and having attorney's fees. I would like to bring up the point: How about the defendants? They would like to get into court, too. Often because of the inordinate amount of attorney fee that could be engendered here, we have to tell the defendant, the policeman, the clerk, that, no, we are going to settle this case. No matter how well-intentioned your actions were, we have got to settle it. We take him out of court.

As you know, nonlawyers feel that is significant, that there must have been some wrongdoing when we are settling this, and the defendant has to live with it.

As the fees and plaintiffs and their beatification, as we heard from the other panel, I am reminded of the attorney who hits the pearly gates and has St. Peter order him back for another 30 years to earth to justify the fees that he has already billed out.

My second point is a case in our jurisdiction, the city of Milwaukee, a two-pronged suit: One, illegal entry, undue force, and a business loss. Now, the business loss took up all the attention of the plaintiff's attorney. There were at least 20 depositions; there were 3 amended complaints. There are all kinds of legal activity. We get down to 2 days before the trial. The business loss case was dismissed by the plaintiff. In order to justify the fees, they had to go forward on a very shaky, iilegal entry, undue-force case. They received an award of $1,000 for the illegal entry. The attorney's fees were $18,000. There was no way we could settle up the iilegal entry fee case and award when the staggering fee was an element behind the decision of the plaintiff to sue.

Concluding, I think NIMLO's stand is right. The traditional way for lawyers is to assess and evaluate a case and settle it on that basis. The specter of having a fee completely distinct from the value of the case is foreign to the practice of the law.

I do not think, when this fee schedule or fee law was passed in 1976, we had any idea of keeping a law firm busy in a slack period of time, and that is what I see and what my experience is in the city of Milwaukee. Often that happens.

In conclusion, we are for adequate compensation for attorneys, but we do not want them handsomely rewarded. Thank you.

[The prepared statement of Mr. Brennan follows:]

PREPARED STATEMENT OF JAMES B. BRENNAN

INTRODUCTION

On behalf of the approximately 1600 local governments comprising the membership of the National Institute of Municipal Law Officers (NIMLO), I thank the Committee for the opportunity to appear at this hearing to urge the Committee to consider amendments to the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. Three of my colleagues appeared before the Committee on May 6, 1981, in support of S.584 and S.585. They presented factual material, collected from NIMLO members, documenting the effect that recent United States Supreme Court decisions in the area of Section 1983 liability has had on local governments. While their comments focused primarily on the need for amendment of § 1983 as embodied in S.584 and S.585, they stressed that amendment of § 1983 alone would not solve the problems confronting local governments faced with a litigation explosion as a result of the decisions in Monell, Owen and Thiboutot, and urged the Committee to consider amendment of § 1988 as well. I wish to add to their testimony my reasons for the necessity of § 1983's amendment.

The Act today provides a federal remedy for every person who claims a federally protected right was violated. Such remedy is actionable irrespective of whether the person has an adequate remedy available in the state courts, or irrespective of whether or not the defendant had a specific intent to violate the rights of the person. The result is that a civil rights case is no longer a special case in which the federal courts act to provide a remedy not in practice available in the state courts, but rather, every common law tort committed by a public official can be a civil rights case.

The large growth in civil rights litigation has been fueled by the fact that it is most advantageous when confronted with the common law tort case against the public official to plead the case in the form of a civil rights violation. A federal civil rights action allows the injured person to avoid state imposed immunities and limits upon liability and allows the attorney to recover his fees from the defendant under the Attorney's Fees Awards Act. The result is that the civil rights law, rather than being the means of redressing wrongs in cases where the states are unwilling or unable to act, has become a means of avoiding legitimately imposed state immunities and limits on liability and for obtaining attorney's fees in a large group of cases where such remedies are neither desirable nor necessary to effectuate the purposes of the civil rights law.

In the case of my state, the State of Wisconsin, the Legislature has recently passed a $50,000 limit for actions against municipalities. This was raised from $25,000 in 1981. This limitation has been recently upheld by the United States Supreme Court. The effect of § 1983 actions effectively raises the municipalities in Wisconsin's exposure from $50,000 to an unlimited exposure even though the United States Supreme Court has upheld the limitation mechanism in *Sambs* v. *City of Brookfield*, 95 Wis.2d 1, 289 N.W.2d 308, 97 Wis.2d 356, 293 N.W.2d 504, cert. denied 449 U.S. 1035 (1980). My second point deals with the effect of the present allowable fees in § 1988.

The forced settlements of frivolous or marginal claims which result because of the oppressive nature of the Attorney's Fees Awards Act not only result in large expenditures of money by a municipality but can also have a detrimental effect on individual police officers who are wrongly accused, on their families, and on the morale of the police force as a whole. Often when police officers are sued, the suit is the subject of publicity in newspapers, radio and television. In a small community the existence of the suit becomes public knowledge even without wide publicity. This affects not only the police officer but the officer's family as well. When an action for violation of civil rights is groundless, ordinarily the officer can endure the emotional stress caused by the publicity knowing full well that he will have his day in court and be exonerated. If the municipality, being ultimately liable to pay any judgment and attorney's fees settles the case to avoid the possibility of a large attorney's fees award, the police officer will be deprived of the opportunity to show that the charges against him are false.

Although a settlement legally is not considered to be an admission of liability, the public generally views a settlement as an admission of liability. The police officer, consequently, in the public mind is viewed as a wrongdoer. The result of the settlement, therefore, is that although the municipality has avoided the risk of a large judgment, the police officer and his family are left to endure the emotional stress which results from the police officer being publicly portrayed as a wrongdoer.

The Civil Rights Attorney's Fees Awards Act in its effort to insure that all persons with civil rights claims will have their day in court irrespective of the cost of the litigation has created a situation where the cost of the litigation in many cases deprives the accused police officer of his day in court. This situation will continue unless the Attorney's Fees Awards Act is amended to protect the interest of the defendants as well as the plaintiffs.

In addition to my first example of how the spector of a large attorney's fee affects the right of municipal defendants to have their day in court, I would like to relate an instance of litigation designed to protect an attorney fee. The case involved the operator of a movie theatre who brought a two-pronged attack against the City of Milwaukee. One cause of action was against a number of City of Milwaukee police officers alleging that they entered a movie theatre without probable cause and without a warrant and that subsequent to their entry, they falsely arrested the operator of the theatre and used more force than was necessary in effecting the arrest of the operator. The second cause of action was for business loss. This second action, business loss, involved considerable discovery proceedings. There were three amended complaints filed and over thirty depositions were taken. Thousands of pages of Police Department records were produced in response to discovery demands, primarily for the business loss aspect of the litigation. Two days before the trial began, the operator dropped his claim for business loss.

The case was tried in the United States District Court before a jury and at the conclusion of the trial, it was found that although officers violated the civil rights of the theatre operator by entering the theatre without a warrant and without probable cause, the arrest of the theatre owner was proper and no excessive force was used in the course of the arrest. The damages awarded for the illegal entry amounted to $1001.00. Costs were awarded against the police officers who had entered the theatre illegally in the amount of $3,826.46. The police officers who were acquitted obtained a judgment against the theatre operator for costs in the amount of $1,104.70. The attorney for the theatre operator was awarded $18,275.00 for the reason that he prevailed on that part of the suit alleging illegal entry. The police officers acquitted of any wrongdoing were precluded from seeking attorney's fees for the reason that they could not show that the action against them was frivolous.

Once the claim made by the plaintiffs for business loss had been dropped, the primary purpose of the trial was to allow the plaintiffs to attempt to recover attorney's fees for the reason that there remained no other grounds for substantial damages in the case. The large amount of attorney's fees outstanding at the time prevented a settlement of the illegal entry claim.

On behalf of the NIMLO organization, I urge that 42 U.S.C. § 1983 should be limited to civil rights actions to prevent the injustices that I have discussed above.

Section 1988 needs a mechanism in the form of an offer of judgment by the defendant to curb the unjust results of § 1988. The plaintiff's attorney should be given the option of making a reasonable settlement or have his attorney's fee denied, if his valuation of the case does not materialize at trial.

I believe these suggestions would solve the problem of encouraging attorneys to take these actions but also prevent the outrageous results of obtaining a $1,000 judgment for a client and a $19,000 attorney's fees award.

Thank you again for this opportunity to appear on behalf of the National Institute of Municipal Law Officers.

SENATE COMMITTEE ON THE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION

March 1, 1982

PREPARED STATEMENT ON BEHALF OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS

by

James B. Brennan, City Attorney, Milwaukee, Wisconsin

Introduction

On behalf of the approximately 1600 local governments comprising the membership of the National Institute of Municipal Law Officers (NIMLO), I thank the Committee for the opportunity to appear at this hearing to urge the Committee to consider amendments to the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988. Three of my colleagues appeared before the Committee on May 6, 1981 in support of S.584 and S.585. They presented factual material, collected from NIMLO members, documenting the effect that recent United States Supreme Court decisions in the area of Section 1983 liability has had on local governments. While their comments focused primarily on the need for amendment of §1983 as embodied in S.584 and S.585, they stressed that amendment of §1983 alone would not solve the problems confronting local governments faced with a litigation explosion as a result of the decisions in _Monell_,[1] _Owen_[2] _Thiboutot_,[3] and urged the Committee to consider amendment of §1988 as well.

I am grateful for the opportunity to appear today on behalf of NIMLO to expand upon the earlier comments offered by my colleagues with regard to the attorneys' fees issue. The material submitted to the Committee by my colleagues attempted to point out the facts and nature of litigation under §1983. It is in this manner that we feel we can be of greatest service to the Committee. Thus, my comments will focus upon my experience with attorneys' fees awards under §1988, as well as the experiences of my colleagues with which I am familiar. I ask that my prepared statement, collecting the experience of NIMLO members on the attorneys' fees issue, be incorporated into the hearing record.

I wish to stress at the outset, as did my colleagues in May, that we are not against the vigorous enforcement of legitimate civil rights. Some city attorneys are elected; all work for elected local officials. None either wants or is able to avoid municipal liability for clear violation of constitutional rights by official government policy. That is not why I am here. I am here to oppose application of §1983, and concomitantly recovery of attorneys' fees, in cases having nothing to do with civil rights, and the denial to local governments of the same defenses available, through a careful balancing of interests, to their government officials. Because this kind of balancing is most properly the task of the Congress, I am before you today.

§1988 authorizes the courts, in their discretion, to award reasonable attorneys' fees to prevailing parties in civil rights actions. NIMLO acknowledges the intention, clearly expressed in the Act's legislative history, that persons seeking to enforce the rights protected by the statutes encompassed by the Act, if successful, "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." 4/ We also acknowledge the intention behind the enactment of the litigation that fee shifting is necessary in civil rights cases if the "civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce." 5/

We submit, however, that the implementation of the Fees Act by the courts has far exceeded the intention expressed in the Act's legislative history. The very broad interpretation of the Act's prevailing party language, in combination with the stringent requirement that a prevailing defendant prove that the plaintiff's action was brought in bad faith 6/ provide an incentive for the bringing of questionable claims. The liberal award of fees for all time spent on claims, despite the failure to prevail on all issues,[7] increased by the use of multipliers, and having no relation to the amount of damages, if any, recovered, encourages protracted litigation because there is no penalty for litigating claims unless they are clearly vexatious or frivolous.[8] Moreover, the availability of fees for the litigation of a fee award[9] only encourages further delay and obstinacy.

Given the slim likelihood of recovering the costs of the municipal defense and the very real possibility of being liable for attorneys' fees even though not liable for a judgment on an underlying §1983 claim,[10] governmental defendants are being forced to settle even frivolous suits. The very real threat of a substantial award of attorneys' fees, despite the failure to prevail on all issues, and bearing no relationship to the amount of damages actually awarded, is detailed in a letter from an Assistant City Attorney of Tacoma, Washington which is appended as Exhibit 1 to my prepared remarks.

The implementation of the Fees Act by the courts, armed with its legislative history, has been well-documented before the Committee. I will not repeat that history. I will, however, share with the Committee the experiences of local governments under the Act, as implemented by the courts. I will also suggest some changes to the Act which, we submit, would go a long way in restoring the original intention of this legislation.

THE FEES ACT, AS IMPLEMENTED, ENCOURAGES THE BRINGING OF FRIVOLOUS ACTIONS

The most objectionable result that the courts' implementation of the Fees Act has had is the encouragement of frivolous lawsuits. This effect is especially pernicious because the municipal defendant will rarely recover the costs of its defense, despite the Act's "prevailing party" language, as the experience of NIMLO members illustrates.

An apt illustration is provided by a §1983 suit against the Village of Tinley Park, Illinois alleging a Village custom or policy requiring the use of excessive force by police officers in making arrests. The action was brought by a person convicted of armed robbery and attempted murder, who shot and severely wounded a police officer during his arrest. The Village filed a motion for summary judgment establishing the lack of such a policy or custom. Rather than respond to the motion, the plaintiff moved for voluntary dismissal of the claim against the Village with prejudice. The court denied the plaintiff's motion and granted summary judgment for the Village. Nevertheless, the court denied the Village attorneys' fees, refusing to find that the plaintiff's attempt to voluntarily dismiss the Village established the frivolous nature of the claim under Christiansburg Garment. [Exhibit 2]

In at least one court's opinion, §1988 has become a catalyst for litigating a claim which otherwise would have been settled. Skoda v. Fontani, 646 F.2d 1193 (CA 7), on remand, 519 F.Supp. 309 (N.D. Ill. 1981). Plaintiffs in a suit alleging false arrest, false imprisonment, and use of excessive force were awarded $1.00 in damages by a jury. According to the court, there was a bona fide dispute prior to trial as to liability, but the plaintiffs were clearly unprepared to prove more than token damages. 519 F.Supp., at 310, n.1. The district court denied their request for attorneys' fees. On appeal, the denial of fees was reversed and remanded for consideration of whether any special circumstances existed to render the award unjust.[11] On remand, the district court enumerated the special circumstances supporting its denial of fees: plaintiffs sought $200,000 in their complaint; prior to trial, they could have settled for $3,000 and could have settled for at least $1,500; the jury further discounted the value of plaintiffs' claims by awarding them $1.00 each. Id., at 309. Furthermore, the court noted, "[d]uring settlement negotiations, it became apparent to this Court that a major reason why this case did not settle for the nominal sum that was warranted, and instead went to trial, was because plaintiffs' attorney would not, in his view, be adequately compensated if the case were settled for $1,500." Id., at 310. [Exhibit 3].

Skoda v. Fontani. It is discouraging, to say the least, to the defendant. We doubt that it is the result that was intended by the Congress when it enacted the Fees Act.

THE COST OF DEFENDING FRIVOLOUS CLAIMS FORCES SETTLEMENT

The implementation of the Fees Act has had another serious, and unintended, we submit, effect on local governments forced to defend frivolous civil rights claims which is also documented by the experiences of several NIMLO members.

The cost alone of the local government's defense of frivolous civil rights suits has forced some local governments, faced with such a suit, to settle when it would have preferred to litigate. Given the very real reluctance of the courts to award fees to prevailing governmental defendants, as documented in our earlier testimony before this Subcommittee in May,[12] the possibility of recovering defense costs is illusory despite the Act's "prevailing party" language. Moreover, given the financial condition of many plaintiffs, an award of fees, even if granted, would rarely be recovered. It was just such "hard facts" that forced the City of Kearney, Nebraska to settle a case arising out of the arrest by a city police officer of the plaintiff under a warrant erroneously issued by the court for the wrong individual.[13]

This case, we submit, is typical of what occurs frequently, though is rarely reported quite so pointedly as it was here, in suits against local governments as a result of the manner in which the Fees Act has been implemented. The absence of risk in litigating arguably frivolous claims and the very real possibility of recovering attorneys' fees for successful litigation of at least some portion of the claims produces the result reached in Similarly, a suit against the City of Wilmington, Delaware alleging false arrest and claiming $400,000 in damages was settled for $4,000 including attorneys' fees by the city's insurance carrier despite the city's desire to go to trial.[14]

Peoria, Illinois reported a case that has been pending against the city for eleven years by a prisoner, convicted of murder and armed robbery and serving a sentence of over 100 years. The suit alleges police brutality in the course of the plaintiff's arrest. The case has had an involved procedural history. After dismissal and appeal, a Chicago law firm was appointed counsel for the plaintiff. Despite the city's belief that the case is frivolous, the possibility of even an award of nominal damages against one of the defendants would subject the city to at least a five figure award of attorneys' fees. For this reason, the city may be forced to settle the suit.[15]

We submit that rewarding litigiousness and forcing settlement of frivolous claims because of the cost of municipal defense and the very real possibility of exhorbitant attorneys' fees awards were not the results intended by the Congress in enacting a mechanism to encourage the private enforcement of the civil rights laws . Nevertheless, these are the results that implementation of the Fees Act has produced.

RECOMMENDATIONS

Short of making attorneys' fees unavailable in §1983 actions against local governments, other restrictions would go far to alleviate our concerns. We suggest the following possibilities:

1. Require that the plaintiff show a causal connection between his action in bringing suit and any subsequent change in official governmental policy or conduct. This would require more than a showing of coincidence.

Such a requirement would prohibit the award of fees in a case such as that involving the City of Tarpon Springs, Florida. Two class action suits alleging discrimination in the provision of municipal services and in employment practices against the city were voluntarily dismissed with prejudice by the plaintiffs after several years of discovery and pretrial procedure. The plaintiffs now seek attorneys' fees based on the "catalyst theory.[16] Prior to the commencement of the litigation against the city, the city was involved in a program to improve personnel practices, employment, recreation and other municipal services. The catalyst theory allows the plaintiffs to recover attorneys' fees because of the city's own voluntary actions in upgrading its practices. The result is the punishment of a party for voluntary good faith efforts. [Exhibit 4].

2. With regard to the determination of "reasonable" attorneys' fees:

a) Recovery should be limited to that time spent only on those issues on which the party prevailed. The extent to which at least one court has gone in awarding fees to a "prevailing" party despite the failure to prevail on the major issue is illustrated in a case, an appeal of the attorneys' fee award in which is pending before the Eighth Circuit. The plaintiff, in a case challenging the validity of the advertising restrictions of Iowa Code of Professional Responsibility for Lawyers, obtained limited injunctive relief on four of the fourteen separate issues. The main issue framed in the plaintiffs' complaint was decided in favor of the defendant. One of the four issues on which the plaintiff prevailed was not even contested by the defendant; two of the other issues were briefed and decided by the Court without the aid of the plaintiffs' counsel. Nevertheless, the Court awarded the plaintiff attorneys' fees for all of the legal work and awarded an additive of 25%. [Exhibit 5].

b) Determination of the fee award should not allow the use of a multiplier. Computation of the award should be based on the hourly rate times the number of hours spent on the issues on which the plaintiff prevailed.[17/] We would urge the Subcommittee to also incorporate into this limitation the recommendations of the National Association of Attorneys General in testimony before the Subcommittee on July 23, 1981.[18/]

c) Fee awards should be subject to a "cap" of 1/2 of the damages recovered.[19/] Where the suit results in an injunction or declaratory judgment, fees should not be allowed absent a showing that the suit produced the desired change in governmental action, subject to a limit on the maximum amount recoverable.

3. Fees should not be allowed for the litigation of a fee award. In earlier testimony before the Subcommittee, the plaintiffs' bar expressed its view, in criticism of this proposal, that governmental defendants experience no pressure to settle on reasonable terms. We disagree with this viewpoint and we are supported by the experiences of two municipalities,[20/] both of which were forced to go to trial because the plaintiff refused to settle. In both cases, the judgments plaintiffs received were considerably less than what was requested, and in one case, significantly less than what was offered in settlement. As we have shown, [21/] the cost of the municipal defense alone exerts substantial pressure on the municipality to settle prior to trial.

4. Amendment of the Fees Act should also provide for more equal treatment for prevailing government defendants. This would necessarily require the legislative overruling of Christiansburg Garment. Such a change could be accomplished by inserting language authorizing the court, in its discretion, to award attorneys' fees to a prevailing party provided that the same standards applied to prevailing plaintiffs would be applied equally to prevailing defendants.

In considering such an amendment, we ask the Subcommittee to recognize the very real power wielded by the national plaintiffs' civil rights organizations such as the NAACP, ACLU and the Lawyers' Committee for Civil Rights Under Law. The growth of these national organizations and the active role they play in civil rights litigation today calls into question the need for the Fees Act in order to encourage the bringing of meritorious suits. The threat of the legal and financial resources of such organizations is a very real one, particularly to smaller local government bodies, with limited financial and legal ability, who are often the focus of a test case.[22/]

5. Finally, we suggest that no fees be awarded to an organization or association whose financial support is derived from sources other than legal fees unless the organization or association can

show that it would not have brought the case but for the availability of the fee award.[23]

CONCLUSION

We do not deny or wish to inhibit the right of the truly aggrieved victim of a violation of his civil rights to recover for his injury. Nor do we dispute placing the burden of the cost of proving a true violation on the violator in order to accomplish the goals embodied in the civil rights statutes. However, we do oppose the lengths to which the courts have gone, in implementing the Fees Act, to accomplish those goals. The manner in which the courts have implemented the Act provides an incentive for the bringing of frivolous lawsuits. The threat of an award of attorneys' fees bearing no relationship to the relief actually received forces the settlement of many claims. As we have seen, even where settlement is the preferred manner of resolving the dispute, to the plaintiffs' benefit, the recovery of attorneys' fees replaces the vindication of the individual's civil rights as the ultimate goal.

This was not the intention of Congress when it enacted this legislation. Such extremes are unnecessary to the accomplishment of the goals of the legislation. In closing, we repeat the civil rights community's own warning that the too-ready availability of civil rights claims and of attorneys' fees, will influence the courts' delineation of the civil rights themselves. We urged the committee to heed this warning with respect to its consideration of the need for restoring a good faith defense to local governments in §1983 actions. We submit that the concern expressed there, that the drain on the public treasury, in the absence of a good faith defense, "may create a very subtle pressure [on the courts] in the direction of restricting the very definition of constitutional rights in the first place,"[24] is equally applicable to this committee's consideration of the need to amend the Fees Act.

Thank you again for this opportunity to appear on behalf of local governments.

FOOTNOTES

1/ Monell v. Department of Social Services, 436 U.S.658 (1978).

2/ Owen v. City of Independence, 445 U.S.622 (1980).

3/ Maine v. Thiboutot, 448 U.S. 1 (1980)

4/ S.Rep. No. 94-1011, 94th Cong., 2d Sess., 4 (1976) citing Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968).

5/ Id., at 6.

6/ Kane v. City of New York, 468 F.Supp. 586 (S.D.N.Y. 1979).

7/ Dowdell v. City of Apopka, 521 F.Supp. 297 (M.D. Fla. 1981).

8/ Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978).

9/ Love v. Mayor, City of Cheyenne, 620 F.2d 235 (CA10 1980).

10/ Entertainment Concepts, Inc. v. Maciejewski, 631 F.2d 497 (CA7 1980), cert. denied, __ U.S. __ (Feb. 23, 1981), suit filed prior to the decision in Monell. The same result could occur where the governmental body is not a party.

11/ Newman v. Piggie Park Enterprises, Inc. 390 U.S. 400 (1968).

12/ Prevailing governmental defendants have been informally advised by the courts that they may not recover attorneys' fees. See, Municipal Liability Under 42 U.S.C. §1983; Hearings on S.584, S.585, and S.990 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess., at 148-49 (1981), hereafter referred to as Hearings on Municipal Liability.

13/ Id., at 191.

14/ Id., at 201-04.

15/ Id., at 239-41.

16/ Winslow v. Kansas Board of State Fair Managers, 512 F.Supp. 576 (D. Kan. 1981), prior to the grant of summary judgment in favor of intervenor-plaintiffs' action challenging the "booth" rule of the state fair board, the named plaintiffs were dismissed from the case. The court held, nevertheless, that they were prevailing parties and entitled to attorneys' fees.

17/ See Note, Promoting the Vindication of Civil Rights Through the Attorney's Fees Awards Act, 80 Colum. L. Rev. 346, 374-76 (1980).

18/ Municipal Liability Hearings, n. 12, supra, at 548-49. "To the extent that any attorneys' fees are awarded to either private attorneys representing private litigants or public agencies or publicly funded private organizations such as legal services societies, they should be based only on the work actually and necessarily performed in order to secure the result obtained." (emphasis in original).

19/ In this regard, we note a recent proposal by this Administration which would impose a cap on fees paid to prevailing plaintiffs under statutes authorizing attorneys' fees awards, based on the hourly rate paid to government attorneys. The proposal would also require the fee award to bear a reasonable relation to the result achieved in the legal proceeding. Washington Post, Feb. 10, 1982.

20/ Exhibits 1 and 3. In Kreling v. City of Tacoma, referred to in Exhibit 1, the plaintiff refused to settle for less than the $300,000 originally requested. A 10 day trial resulted in an award of $5,000 and $532.00 in backpay, and $18,000 in attorneys' fees. No pattern or practice of discrimination was found and the plaintiff prevailed on only a small portion of the cause of action.

21/ Municipal Liability Hearings, n. 12 supra, at 151.

22/ For example, the Lawyers' Committee for Civil Rights Under Law, assisted by grants from private foundations, has created a North Carolina Municipal Services Project to litigate cases against cities in that State. The first three targets were cities of 26,000, 33,000 and 14,000 in population. Lawyers' Committee, Monthly Report, December 1980.

23/ A similar recommendation has been made by the National Association of Attorneys General, Municipal Liability Hearings, n. 12 supra, at 549.

24/ Civil Rights Improvement Act: Hearings on S.35 before the Subcommittee on the Constitution of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess., 49 (1978).

EXHIBIT 4

City of Tarpon Springs, Florida

SUITE 17
101 WEST COURT STREET
POST OFFICE BOX 1575
TARPON SPRINGS, FLORIDA 33589
(813) 938-3711

OFFICE OF CITY ATTORNEY

September 14, 1981

67

Honorable Bill McCollum
Congressman 5th District
1313 Longworth House Office Building
Washington, D.C. 20510

In Re: Proposed Amendment to the Civil Rights Act, 42 U.S.C. §1983

Dear Representative McCollum:

This letter is written on behalf of the City of Tarpon Springs, Florida, which has authorized me to respond to a request by Claude L. Mullis, League Counsel for the Florida League of Cities. Mr. Mullis has requested those cities, which have been involved as parties defendant in civil rights litigation, respond concerning claims which would be of interest to the Senate Subcommittee on the Constitution. I spoke some months ago with your special assistant, Mr. Steve Van Slyke, who was most interested and requested that we submit this information to you, for transmittal to that Senate Subcommittee, which is considering amendments to the statute in question. I apologize for the delay, but this is due to intensive examination through previous records in order to itemize attorneys fees caused by this litigation over the past four years in Tarpon Springs.

At the outset let me state that the Civil Rights Act has assisted a number of people to remedy wrongs of government in the past. My purpose in this letter is simply to point out the fiscal impact of two lawsuits filed against the City of Tarpon Springs.

Late in 1977, Tarpon Springs was served with a lawsuit filed in the Federal District Court for the Middle District of Florida. The lawsuit claimed that Tarpon Springs provided various municipal services on a racially discriminatory basis. While I am not attorney of record in that matter, I do have some personal knowledge of the litigation. The lawsuit has been certified as a class action, on behalf of all Black citizens in Tarpon Springs. After four years of extensive and expensive discovery and pretrial procedure, the Plaintiffs abruptly voluntarily dismissed the lawsuit with prejudice. Despite the fact that the Plaintiffs "threw in the towel", the Plaintiffs' attorneys are demanding that their fees and expenses, in the amount of $31,509.88, be paid by the City. The ground for this claim is that the lawsuit has been a "catalyst" in efforts of the City over the past several years to correct the allegedly discriminatory practices in recreational facilities within the City. Additional counts, in an earlier complaint, which alleged racially discriminatory practices in other municipal services, were voluntarily dismissed. The fees claimed by the attorneys for the Plaintiffs are at the rate of $100.00 per hour per attorney, plus expenses of $4,364.88. Judicial construction of the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. §1988, presently allows attorneys fees, but only if the Plaintiffs prevail on the merits of at least some of the claims alleged. To date, the City of Tarpon Springs has expended $29,974.30 for attorneys fees for our own counsel, who was the City Attorney at the time the lawsuit was filed, plus approximately $6,500.00 for costs and expenses in defense of the claim. Our attorney has been paid at the rate of $60.00 per hour. I would like to emphasize that the claim for attorneys fees, which is still pending, is after the Plaintiffs voluntarily dismissed with prejudice all claims against the City.

In the middle of 1978, Tarpon Springs was served with another lawsuit filed in the Federal District Court for the Middle District of Florida, which alleged racially discriminatory employment practices. This action has been defended by our special counsel on labor matters. After three years of discovery and pretrial procedure, the class action Plaintiffs have entered a voluntary dismissal with prejudice in that case as well. After the dismissal was entered, the Plaintiffs moved for an award of attorneys fees, again based upon the claim that they were the prevailing party in the litigation on the "catalyst" theory. The same attorneys represented the Plaintiffs in both federal actions against the City, and strangely enough, also represented other class action Plaintiffs against many other cities in Florida as well. To date, we have paid our attorney in the employment discrimination case, the sum of $10,162.50 at the rate of $50.00 per hour, which is half his normal rate. In this action, Plaintiffs' attorney has asked for the sum of $16,099.65, which is pending at this time.

I would like to make some general comments concerning the "catalyst" theory. As you are well aware, the common law for hundreds of years has held inadmissible as irrelevant evidence of rehabilitated conditions after a claim is filed, in order to encourage repair and prevent harm. Under the "catalyst" theory, such evidence is now relevant. Furthermore, a city can be involved in revising its policies and subsequently be served with lawsuits such as those discussed above. The city would then be subjected to a claim that in part the program for improving practices continued because of the lawsuit. This is the exact situation in the City of Tarpon Springs, where prior to the litigation, the City of Tarpon Springs engaged consultants and otherwise had established a planned program to improve personnel practices, employment, recreation, and many other municipal services. This type of strategy and tactics has the effect of encouraging public officials to do absolutely nothing and take their chances with lengthy litigation. The effect of the Attorneys Fees Act, as judicially construed, with its "heads I win, tails you lose" philosophy is discouraging to those who are charged with the sworn duty to preserve and protect the public welfare. To be the "prevailing party" means just that - to prevail on the merits of at least one issue in a case involving several issues. To allow a theory to stand where the

Plaintiff does not gain any of the relief requested in the initial complaint, but is allowed to recover all attorneys' fees and costs because of the City's own voluntary actions in upgrading its practices, results in a party being punished for voluntary good faith efforts.

We have also had some problems with the Office of Revenue Sharing, which are incidental to the two lawsuits discussed above. We have also spent many thousands of dollars in defense of claims filed with the Office of Revenue Sharing, alleging racially discriminatory spending of Revenue Sharing funds. Attorneys fees and costs expended in the defense of the Revenue Sharing complaints have not been included in the above figures. Incidentally, I understand that there were three separate ORS investigations and hearings, each of which resulted in favor of the City, although there were some routine findings initially made and later amended in favor of the Plaintiffs. The investigation officers of the Office of Revenue Sharing were trained by the Plaintiffs' counsel, and have so admitted upon being confronted with this question.

I would urge that the Congress amend the Civil Rights Act and the related Attorneys Fees Act, along the following lines:

a. Expanding the immunity of a municipality and its officers, allowing actions only in the most egregious circumstances;

b. A prohibition of the remedy of monetary damages for injuries sustained as a result of a violation of §1983, especially for class action claims alleging discrimination in employment and the provision for public services, as well as matters concerning public safety, business regulation, land use and zoning, and anti-trust matters;

c. A repeal of the "catalyst" theory, in order to encourage Defendants to take action which they deem to be in the best public interest, without regard for its effect, pro or con, on pending litigation.

d. The same test for reimbursement of attorneys fees and costs should be applied to both the Plaintiff and Defendant. At present, we must prove that the Plaintiffs acted maliciously and in bad faith, in order to obtain attorneys fees from the Plaintiffs. Furthermore, in the most onerous of cases, recovery should be allowed against the attorney for the Plaintiffs, who is in general the only party of any substance from whom a judgment may be collected.

Recent interpretations of §1983 by the Supreme Court of the United States has also restricted qualified individuals from serving their society because of the threat of personal liability. There is a serious crisis of leadership in this entire society, affecting parents, teachers, employers, state and local government, the police, and no doubt many other of our existing institutions. If we do not take immediate action to return confidence in our public institutions, then, like other areas of the world, we will soon be in chaos.

Very truly yours,

CITY OF TARPON SPRINGS

Herbert Elliott

Herbert Elliott
City Attorney

Senator DECONCINI. Vice Mayor Burns from Chandler, Ariz., we welcome you here. I am glad you brought the nice weather with you from the Valley of the Sun.

STATEMENT OF TOM BURNS

Mr. BURNS. Thank you, Senator. My name is Tom Burns. I am the vice mayor of Chandler, Ariz., a rapidly growing community located just southeast of Phoenix. Thank you for inviting me here.

Senator, the awarding of attorney's fees, I think, should be discretionary with the judge. I was encouraged with the former Congressman saying that they were, but that is not the way I read the statute. I think the court ought to have some guidelines in the statute. Factors such as how much merit the case actually has, how important it is in the overall development of the law in this area, the amount recovered in relation to the attorney's fees awarded somehow, without having done a great deal of research, just looking at it on the face of $160,000 in attorney's fees for $33,000 worth of damages causes me great concern.

I am not saying that is the case in that particular case or the case where there was actually $750 in damages and over $6,000 in attorney's fees awarded. It seems that the potential for a plaintiff's attorney to keep that lawsuit open and going is very, very great at that point.

I think the attempts to resolve the matter to settle it short of litigation should be taken into account. The parties that are involved, you can have cities at a great disadvantage in relation to the plaintiffs, particularly by when you talk about the expertise of the attorneys involved.

I definitely feel that fees should be allowed only on the issues that pertain to the civil rights and only on those that plaintiff prevailed on.

The statute is a definite improvement over what we have at the present. But, again, I am not sure it goes quite far enough. Line 11 on page 1, where it says they shall provide the attorney's fees, I think again should be changed to may. Make it discretionary. Let the court have some leeway in the matter.

I feel that the standard for the defendants is extremely high, but it is actually one that we can live with in view of the overall purpose of the legislation.

We have some problems with prevailing plaintiff, exactly what that means, but again it is something that we can't actually live without.

On the second page, where it is talking about the offer of judgment situation, I often wonder if possibly—and again this would be within the discretion of the judge—we should not consider allowing the defendant municipalities recovery of at least part of their attorney's fees when there has been a successful offer of judgment extended to the plaintiffs.

Again, I have some problems also with fully awarding attorney fees to organizations that are receiving outside support, unless it is an unusual case, unless it is a case that really advances the overall law in that situation or unless there are some other special circumstances that would justify the awarding of attorney fees in those particular matters.

Another area of concern is awarding attorney fees where there has been litigation over the amount of the attorney fees that have been submitted to the court unless the plaintiff's attorney fees are substantially upheld. I think by not shedding that you would open another Pandora's box.

One of the complaints from the other panel was that the defendants would come in early with an offer, you know, one that would be, I gathered, eventually the final offer or the final award or greater than that. Well, that is the whole purpose of the statute. An early offer promotes an early settlement, which keeps it out of the courts, which unclogs the system. I find nothing wrong with that.

It was said that you sometimes cannot control your client. Clients are very much, as I am sure you are all well aware, Senator, easier to control when they realize they are going to have to pay their own attorney fees. They become very difficult to control with respect to settling the case when somebody else is going to pay their attorney fees.

One of the complaints is that local governments, county governments are arrogant, they are stubborn, they refuse to honestly negotiate in good faith, and so on. Well, if that is the case, fine; they deserve to get stuck. They deserve to get stuck not only with their attorney fees but with the plaintiff attorney fees. I could not agree more. I do not think that that is the situation in Arizona and has not been a situation that I have experienced elsewhere.

I basically agree with the theory of awarding the attorney fees where it is necessary to encourage private attorneys to take civil rights cases, especially cases that have possibly little monetary claim but which litigate important principles of constitutional law. But, again, the awarding of attorney fees should be to mitigate the expense of litigation. The amount should be determined by the court only after consideration of all relevant factors. Thank you.

Senator DECONCINI. Thank you, Mr. Burns. Are you the city attorney also for the city?

Mr. BURNS. No, sir.

Senator DECONCINI. Have you been the city attorney?

Mr. BURNS. No, sir.

Senator DECONCINI. I was misinformed, or I thought perhaps you were.

Do you have any examples in Chandler, Ariz., where cases have been brought that have caused the problems that you make reference to? Has Chandler been the defendant?

Mr. BURNS. No, sir. In looking at the outstanding cases a year ago, I think Phoenix, Tempe, and Tucson were the only ones in Arizona that have been subjected. They were talking about the difficulty. I am a lawyer. I practice law in Chandler. Possibly that is where the confusion came from.

Senator DECONCINI. I knew that.

Mr. BURNS. Personally, I thought maybe I had found a new area to attempt expertise in.

Senator DECONCINI. The National Institute of Municipal Law Officers in their statement recommends that fees not be awarded for the expenses of litigating the award of fees. Their testimony responds to the criticism of that proposal that governments would have no pressure to settle on reasonable terms by arguing that the cost of the municipal defense alone exerts substantial pressures on the municipality to settle prior to trial.

Do you think that such pressures to settle exist?

Mr. BURNS. With respect to municipalities, very definitely. It is almost like litigating against an insurance company. The jury says, you know, there's this big city and it has a budget of $28 million last year, and here's this poor guy who has been, you know, damaged.

Those things tend to get out of hand, definitely.

Senator DECONCINI. Being a member of the City Council of Chandler, if Chandler was sued and the plaintiff was awarded substantial attorney's fees and a judgment, what do you think would be the results of the city council? Purely on a hypothetical case, would you cut your budget? Would you raise your taxes in order to come up with those funds?

Mr. BURNS. Well, unless you got into a situation like South Tucson finds itself in, where they are virtually bankrupt by virtue of a judgment, not particularly in this area, Chandler is growing and has a rapidly expanding tax base. It would have to be an extremely substantial amount to materially affect us. But I am sure that we do not have any extra money laying around. Whatever award would come about, we would have to cut something back somewhere. It is all spent every year.

Senator DECONCINI. The taxpayer is going to have to pay for it.

Mr. BURNS. Yes; sir, no question.

Senator DECONCINI. Thank you. Mr. Brennan, you bring up an interesting point in your written statement submitted that we have had a chance to review.

If a plaintiff brings several counts against a municipality and prevails on only one, can he nevertheless recover the expenses involved in pressing all of them?

Mr. BRENNAN. Yes, he can. He did in this particular case.

Senator DECONCINI. In your opinion, does this encourage plaintiffs or their attorneys to pad the complaint with long remotely legitimate claims?

Mr. BRENNAN. Yes, definitely. That is exactly what happened.

Senator DECONCINI. Have you had that experience?

Mr. BRENNAN. Yes, that is our district. That is the city of Milwaukee.

Senator DECONCINI. That is exactly what you have had.

Your testimony points out that you are witness to frivolous complaints in your judgment. Is that correct?

Mr. BRENNAN. In my judgment, yes.

Senator DECONCINI. And unreasonable and groundless?

Mr. BRENNAN. That is correct, because there is the pot of gold at the end of the rainbow; there is no question about it.

Senator DECONCINI. Do you think that this standard of unreasonableness, and frivolous, and groundless would help the court in determining whether or not to dismiss the complaints and not award fees?

Mr. **Brennan.** Yes. I believe it would be very helpful. You also have to do something to the fees, though. If there is a shred of liability, it is a case that an attorney can comfortably and safely invest many hours of his time because he feels there will be an award, and then it will be a matter of justification of the award to the court.

Senator **DeConcini.** We heard testimony here from the previous panel from actual practicing lawyers that many times they do not get awards, that they go through this effort and receive nothing in return. Then, of course, sometimes they end up getting as much as $200 an hour for that particular case based on the fact that a lawyer puts in a lot of time.

How do you respond to that? Do you think——

Mr. **Brennan.** That is the traditional loss of the attorney taking tort cases. He makes his third when he has a good case. He does not when he does not have a good case. And he does not invest time on a bad case. He makes the evaluation of that case on the exposure and the liability and his chance of success, just like the municipality should be able to do but cannot because the attorney's fees are a factor——

Senator **DeConcini.** Vis-a-vis the need to settle.

Mr. **Brennan.** Correct.

Senator **DeConcini.** Which is what your testimony so ably points out, that from your standpoint the present situation really forces you to settle because of the cost and the time involved.

Mr. **Brennan.** That is correct. A case that we would ordinarily try. In my office I have 28 attorneys. We try our cases. We do not have a factor in our tort actions for settling because of going to trial. We try them all. We would try a shaky liability case. We settle. We settle, too. The earlier panel talked about municipalities' tendency to fight tooth and nail all the way. We settled one short of court, a very substantial one involving police action where a person was shot by an officer who admitted that he lost his cool or whatever. The amount was substantial. It was a structured settlement. So, we paid actually less dollars. But it amounted to a million dollars to this one plaintiff. But there we were able to negotiate the attorney's fee.

Again, we want adequate compensation not handsome reward.

Senator **DeConcini.** Thank you. Attorney General Zimmerman, subsection (a) of S. 585 states that the fee shall be awarded prevailing government defendants, if the court finds the plaintiff's claims were frivolous, unreasonable, without foundation, even though not brought in subjective bad faith. The current standard for awards to defendants is a discretionary one.

It has been argued that changing the standard from a discretionary one to a mandatory one will discourage all but the most airtight claims and thus have a chilling effect on the primary purpose of the Fees Act. What is your response to that argument?

Mr. **Zimmerman.** Well, certainly I do not think that anyone here today on this latter panel is attempting to discourage or chill the bringing of appropriate, well-founded legal actions to insure the enforcement of our constitutional rights. I would respond to your question. I do not interpret what would happen the same way as those who would say that there would be a chilling effect.

You talk about racial discrimination. I think that racial discrimination constitutes per se bad faith. I am in favor of the judicial discretion. I think that the reasonableness of the attorney's fees has to be included in the equation.

Just a few moments ago, your question pointed up that the problem is that in that equation there has to be a combination of things because these moneys are public moneys and are being paid for these awards.

I heard today a little earlier that frivolous suits are brought and they are quickly terminated. Well, I would respectfully disagree with that. I think that frequently in the States we see cases that are not well-founded dragged out for years sometimes. Most of my experience in the frivolous case area deals with prisoners' rights cases, where there is a well-settled course of law, that courts have articulated the standards. Notwithstanding that, these kinds of cases are filed in the Federal courts. They involve the award of counsel fees.

Senator DECONCINI. Thank you. I take it you are Mr. Murphy.

Mr. MURPHY. Yes, sir.

Senator DECONCINI. I would like to direct a question to you. Some of the previous witnesses have expressed the view that there is no problem in the awarding of attorney's fees under section 1988. If the subcommittee feels that there might be, we should initiate a study. You participated in the survey conducted by the National Association of Attorneys General on that issue, did you not?

Mr. MURPHY. Yes. I am the principal author of that study.

Senator DECONCINI. Would you care to comment on your findings?

STATEMENT OF MALACHY R. MURPHY

Mr. MURPHY. In almost every instance that I have heard here today, of course, you will find support in the National Association of Attorneys General's report which I authored for the opposite proposition than what you have heard. The report does indicate that frivolous lawsuits are being litigated. As a matter of fact, the report to a certain extent at least relies on Justice Powell's concurring opinion in *Maine* v. *Tiboutot* for the proposition that frivolous actions are going to be encouraged.

They are frivolous in two respects. I think we have to keep that in mind, and the earlier panel has not commented on that. You not only can have a frivolous claim for a violation of a right or now, since *Maine* v. *Tiboutot,* for the denial of a statutorily provided benefit—and I hope the committee gets us off of that and amends the substantive provisions in that respect—but your claim not only may be frivolous, the joinder with the State claim for the purposes of eligibility for attorney's fees may itself provide the frivolity involved in the litigation.

Of course, we are faced daily—I am defending now a frivolous lawsuit, a lawsuit brought originally in the State court in which attorney's fees were sought under State law, under our State campaign and public disclosure law, by a gentleman who did not feel like reporting campaign expenditures. The Superior Court for the State of Washington denied attorney's fees because the State was found to have acted in good faith. A lawsuit under 1983 in the Federal court— judgment for the State. A $5,000 award of attorney's fees on behalf of the State, probably invalid. I do not think her honor fully understood the attorney's fees law, but she gave us $5,000 in attorney's fees.

An appeal taken in the ninth circuit court of appeals dismissed voluntarily with prejudice because, as the opposing attorney admitted to me, I have read the transcript, I think she got us, we don't have any chance. A couple of weeks later, the same lawsuit, the same complaint filed against the same defendants in the State court to avoid the 11th amendment problem, same allegations, precisely the same facts.

Senator **DeConcini**. The same attorney?

Mr. **Murphy**. The same attorney, same plaintiff, same attorney. Frivolous in the first two cases, more frivolous in the third.

But, yes, there can be two kinds of frivolity. I just hope the committee keeps that in mind, certainly.

Senator **DeConcini**. Thank you, Mr. Murphy. Thank you, gentlemen, very much.

I also want to thank Mr. Ed Baxter of our staff for the preparation in these hearings.

Mr. **Murphy**. Senator DeConcini, I do not want to take up any of your time. I have brought with me prepared statements on behalf of my own attorney general, Kenneth Eichenberry, for the State of Washington; on behalf of John Ashcroft, the attorney general of Missouri; on behalf of Robert Corbin, your own attorney general in the State of Arizona. I am told that I am missing one, also. Who is it——.

Senator **DeConcini**. Very good, Mr. Murphy. All of those will be part of the record, without objection.

[Material referred to follows:]

PROPOSED AMENDMENTS TO S.585 SUBMITTED BY ATTORNEY GENERAL JOHN ASHCROFT OF THE STATE OF MISSOURI

Text of Amendment in Place of the Presently Proposed Subsection (b)

(b) Where a party has prevailed by virtue of a final judgment entered by the court on a pendent claim not covered under Section 722 (42 U.S.C. 1988) but which is joined under the Federal Rules of Civil Procedure to a claim that is under such section, the court shall not award attorneys' fees under this section.

Explanation of Subsection (b)

The present amendment serves no purpose. If the purpose of granting attorneys' fees is to encourage the vindication of genuine civil rights violations -- as distinguished from other civil wrongs -- then there is no reason to grant attorneys' fees if no civil rights violation is found. The effect of the present amendment is to encourage the filing of civil rights counts in the otherwise usual case of a civil wrong involving a state or local government solely for the purpose of guaranteeing attorneys' fees for the plaintiff if he wins on the non-civil rights count. Civil rights counts are also currently added to ordinary cases, classically medical malpractice, simply to provide a more favorable forum for the case than the proper venue would provide. Since any attorney could easily provide testimony that the joinder was for something other than the obtaining of attorneys' fees and since such testimony would be impossible to disprove, there would be no safeguards against such a practice by the present amendment.

Text of Amendment in Addition to the Presently Proposed Subsection (e)

(e)(1) If a party is "prevailing" on only a part of its claim or defense, it may not obtain fees computed on the basis of the time spent on the entire case. The fee award should be reduced by the proportion of time spent on the issues on which the party has not prevailed.

Explanation of Subsection (e)(1)

The State of Missouri has had substantial experience with class action suits involving corrections inmates and mental patients in which Missouri has expended significant resources in time and money successfully defending against a substantial number of the issues presented and yet still has to pay attorneys' fees based on time spent on all the issues because the court refused to reduce the award proportionately. In the suit involving mental patients, Eckerhart v. Hensley, 475 F.Supp. 908 (W.D.Mo. 1979), Missouri prevailed on the vast majority of substantive issues. Yet in a subsequent opinion (unpublished), the court refused to reduce the attorney fee award on this basis, granting fees of $133,332.25 and expenses of $15,177.40. The United States Court of Appeals for the Eighth Circuit upheld the award in a memorandum opinion, refusing to state explicitly its holding on this issue. Even though Missouri filed a petition for a writ of certiorari (Hensley v. Eckerhart, No. 81-1244) on the fee issue, the refusal of the appellate court to state the basis of its affirmance makes it very difficult to obtain review.

The same situation existed in the prison case of Burks v. Teasdale, Nos. 77-4008-CV-C, 75-100-CV-C, 78-4093-CV-C (W.D.Mo., November 3, 1978 and May 23, 1980), appeal from fee award pending in Eighth Circuit (No. 81-1936). Plaintiffs' attorneys were awarded full fees of $107,592.93 and expenses of $23,646.42. The court had given only limited relief to allegations of overcrowding in the first phase of the suit. In the second phase - medical treatment - the plaintiffs had prevailed on only five of twenty-one separate issues raised by them at trial.

The Courts of Appeals are split on this issue with the following cases supporting the position of the State: Nadeau v. Helgemoe, 581 F.2d 275, 279 (1st Cir. 1978); Hughes v. Repko, 578 F.2d 483 (3rd Cir. 1978); Morton v. Charles County Board of Education, 373 F.Supp. 394, 411 (D.Md. 1974), aff'd, 520 F.2d 871 (4th Cir. 1974); Batiste v. Furnco Construction Corp., 503 F.2d 447, 451 (7th Cir. 1974), cert. denied, 420 U.S. 928 (1975); Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002 (9th Cir. 1972); Sethy v. Alameda County Water District, 602 F.2d 894 (9th Cir. 1979). Cases against this position are Brown v. Bathke, 588 F.2d 634 (8th Cir. 1978); Crain v. City of Mountain Home, Arkansas, 611 F.2d 726, 729 n.7 (8th Cir. 1979); Jones v. Diamond, 636 F.2d 1364 (5th Cir. 1981); and Northcross v. Memphis Board of Education, 611 F.2d 625, 635 (6th Cir. 1979).

Text of Amendment (e)(2)

No fee award shall be made to a party, an organization or its attorneys when the attorneys are employed by an organization which pays the attorneys a salary or fixed retainer to perform the actions for which attorneys' fees are being claimed and when the organization or agency receives any funds for its own use from a governmental entity.

Explanation of Amendment (e)(2)

The purpose of providing attorneys' fees to private counsel is to compensate counsel for time spent on a civil rights case that could have been spent profitably on other cases, thereby encouraging these attorneys to take on civil rights cases. Applying this rationale to organizations, such as Legal Aid, which salary their attorneys, only the amount of money it actually took to pay the attorneys for the litigation should be granted for fees. There is no need to encourage these types of societies to take civil rights cases since it constitutes a major part of their general practice. Furthermore, it is particularly inappropriate to grant government funds in the form of attorneys' fees to agencies already funded by the government since the level of funding has already been set by the originally budgeted appropriation or grant. Awarding attorneys' fees would be giving to the organization or agency on ability to increase their activities in a way not envisioned by the funding body.

However, if this subcommittee does not wish to prevent fee awards altogether from such organizations, then the bill should be amended to prevent courts from bassing the amount of the fee award on hourly rates of attorneys in private practice. The award should be based on what the organization actually paid the attorneys for the work on those issues in the case on which the party prevailed. Anything more would be an unjustifiable windfall. Private attorneys do not obtain windfalls under the present amendment subsection (c) and these types of organizations should not either. A good example of this happening is a class action suit on behalf of mental patients in a Missouri mental hospital in which the district court awarded Legal Aid attorneys hourly rates from $40 to $65 when it actually cost Legal Aid about $25 per hour in salaries and applicable overhead. Eckerhart v. Hensley, No. 75-CV-87-C (W.D.Mo., January 23, 1981), aff'd, No. 81-1227 (8th Cir., Sept. 28, 1981), cert. pending, No. 81-1244.

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CHIEF DEPUTY ATTORNEY GENERAL

February 25, 1982

Mr. Peter Ormsby
Professional Staff Member
Subcommittee on the Constitution
Committee on the Judiciary
United States Senate
Carroll Arms Building
Washington D.C. 20510

Re: S. 585, Attorney Fee Awards Against States

Dear Members of the Subcommittee:

The State of Nevada, like most States, has been burdened by the high cost of attorney's fee awards under 42 U.S.C. § 1988. Such fee awards have an especially harsh impact on states like Nevada, which have a relatively small population and a limited tax base, resulting in budget restrictions that make it exceedingly difficult for both State and local governments to deal with large unanticipated attorney fee awards. In addition, Nevada has many counties with populations of less than ten thousand persons, and if any of these counties or any of the smaller communities across our state are adjudged to be responsible for the payment of a large attorney's fee awarded pursuant to 42 U.S.C. § 1988, it is distinctly possible that a cut in local government services would be required in order to pay for such an award.

Under current federal law, the courts are given no discretion to consider the ability of a governmental entity to pay an attorney's fee award or the need of the prevailing party for such an award. I believe this policy is unfortunate, and it tends to engender unhappiness and dissatisfaction with the federal judiciary for being unsympathetic to the implications of their fee awards on local taxpayers. I believe 42 U.S.C. § 1988 should be modified so that the determination of an attorney's fee award must not only reflect what is reasonable for the party bringing the suit but also what is reasonable in terms of the need for a fee award and the impact on the governmental entity which must ultimately pay the award.

A second major area of concern for citizens of the State of Nevada is the awarding of attorney's fees to legal services programs which receive substantial state and federal funding. This is perceived as "double-dipping" or forcing the taxpayers to pay twice for any wrongs corrected by means of civil rights litigation. The 1981 Nevada Legislature enacted legislation to deal with this problem on a state level and clearly indicated as a matter of state policy that double dipping is to be discouraged.

In this regard, I should note that the State of Nevada has no objection to funding legal services for indigent persons. Nevada Statutes specifically provide that three dollars of each court filing fee shall be paid to support legal services for indigents. However, the State of Nevada is opposed to the funding of these legal services by this mechanism and also paying attorney's fees awarded under 42 U.S.C. § 1988. Attached for your consideration is Chapter 705, 1981 Statutes of Nevada. In my view, this legislation is a reflection of the concern of government officials in Nevada, who must know with certainty from year to year the total amount of money to be budgeted for all government services, including legal aid for the poor. If extraordinary fees are awarded to a legal services organization in any given year, which is already receiving public assistance, the budgeting process is skewed in favor of the legal services program at the expense of other programs funded by the affected local government. A not unanticipated reaction of state and local governments affected in this manner is to end state funding for legal services programs.

Such a result would deprive a legal services program of a steady and dependable source of income by which legal services for the poor can be provided and forces legal services organizations to seek higher and higher attorney's fee awards, which has an unsettling and negative impact on the body politic that must pay for these awards. If substantial state funding is eliminated for legal services programs, I am greatly concerned that legal services organizations will direct more of their efforts from providing routine legal services for indigent persons to pursuing lawsuits that seem to offer the best hope of generating fees, so that these legal organizations can continue to survive financially. Obviously, the indigent clients who would not benefit from fee generating cases would ultimately suffer.

Chapter 705, 1981 Statutes of Nevada, which amends NRS 19.031, gives an offset for state funding to the extent that any state governmental entity has paid an award of attorney's fees judicially assessed against it by a legal services organization which receives state funding. The rationale of this bill is that steady funding of legal services is preferable to the boom and bust cycles created by reliance on awards made pursuant to statutes like 42 U.S.C. § 1988.

In this era of "new federalism," I feel it is proper for the Congress to encourage state and local funding of legal services for the poor. However, I do not believe such encouragement can occur if publicly supported legal services organizations can obtain large attorney fee awards against state and local governments pursuant to 42 U.S.C. § 1988. If a state takes it upon itself to provide funding for these programs, it should not have to pay extraordinary or unreasonable fees under 42 U.S.C. § 1988, which in some cases may result in a windfall to the publicly funded organization that equals or exceeds the total annual budget for the organization.

I urge your Subcommittee to recommend that action be taken to avoid double payment by taxpayers, who ultimately must pay any large attorney fee awards assessed pursuant to 42 U.S.C. § 1988 against a state or local government entity in favor of a legal services organization that is already receiving public assistance. S. 585 would appear to be an appropriate vehicle to accomplish this objective. Thank you for your consideration.

Very truly yours,

RICHARD H. BRYAN
Attorney General

Enclosure

Asssembly Bill No. 694—Committee on Judiciary

CHAPTER 705

AN ACT relating to legal services; providing for a recoupment of attorney's fees otherwise chargeable against the state or a county by certain organizations conducting legal aid programs which accept a certain government subsidy; and providing other matters properly relating thereto.

[Approved June 14, 1981]

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

SECTION 1. NRS 19.031 is hereby amended to read as follows:

19.031 1. In each county in which legal services are provided without charge to indigent persons through a legal aid program organized under the auspices of the State Bar of Nevada, a county or local bar association or a county legal services program, the county clerk shall, on the commencement of any civil action or proceeding in the district court for which a filing fee is required, and on the filing of any answer or appearance in any such action or proceeding for which a filing fee is required, charge and collect a fee of $3 from the party commencing or appearing in [such] *the* action or proceeding. [Such fees shall be] *These fees are* in addition to any other fees required by law.

2. On or before the first Monday of each month the county clerk shall pay over to the county treasurer the amount of all fees collected by him pursuant to subsection 1. [The] *Except as provided in subsection 3, the* county treasurer shall remit quarterly all such amounts received by him to the organization operating the legal services program.

3. If the county treasurer receives notice from the state or a political subdivision that an award of attorney's fees or costs has been made to an organization which receives money pursuant to this section and has been paid, he shall:

(a) Deduct an amount equal to the award from the amount to be paid to the organization; and

(b) Remit an equal amount to the state or to the political subdivision which paid the fees or costs at the time when he would have paid it to the organization.

SEC. 2. Section 1 of this act applies with respect to any case pending on and after the effective date of this act.

SEC. 3. This act shall become effective upon passage and approval.

WRITTEN COMMENTS OF ROBERT K. CORBIN, ATTORNEY GENERAL OF ARIZONA CONCERNING AMENDMENTS TO SECTION 1988

As Attorney General of Arizona, I am submitting this written statement in support of proposed legislation which will curb some of the abuses prevalent under the Civil Rights Attorneys' Fees Act of 1976, 42 U.S.C. §1988.

Although I do not quarrel with the simple notion that attorneys' fees awards enhance a litigant's chances of obtaining a lawyer and thereby providing legal representation in meritorious cases which may go unrepresented, that notion, under current practice, has been expanded so that every litigant is looking to attorneys' fees awards as a way to finance litigation. Moreover, the potential burden of having to pay attorneys' fees often affects the states' or defendants' ability to litigate or defend a case fully in trial or on appeal. Therefore, it is not uncommon, in a close case, for the defendant to capitulate early in order to minimize the attorneys' fees liability. An undesirable result of this capitulation is that legitimate questions concerning serious constitutional issues may never be definitively adjudicated by our appellate courts. One way to remedy this problem is to provide that attorneys' fees should not be awarded if the court finds that the states' conduct is in good faith.

Additionally, what was commonly known as civil rights litigation has been greatly broadened by the recent Supreme Court decision in *Maine v. Thiboutot*, 448 U.S. 1 (1980). Literally speaking, that opinion, by redefining 42 U.S.C. §1983, transforms every Federal law question into a civil rights question. Challenges to State laws which are alleged to be in conflict with Federal laws are now civil rights cases entitled to attorneys' fees awards under 42 U.S.C. §1988.

The undue liberalizing of civil rights laws has become mind-boggling. Any state statute or regulation, even in the area of commerce, may now be attacked as a civil rights violation. Conceivably, General Motors can allege a civil rights violation when a State law restricts its franchises. Giants in oil industry can complain of civil rights violations when a state regulates gas stations. In the end, all these plaintiffs will seek attorneys' fees from the state under the Civil Rights Attorneys' Fees Act. Congress could not have intended this result when it enacted the Civil Rights Act shortly after the Civil War. Congress did not intend this result in 1976 when it enacted the Civil Rights Attorneys' Fees Act. Congress must today rectify these unforeseen consequences by amending and clarifying these statutes.

Respectfully submitted,

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STATEMENT
IN SUPPORT OF S. 585 AND PROPOSED AMENDMENTS THERETO
Before the Subcommittee on the Constitution of the Senate Judiciary Committee

BY ATTORNEY GENERAL KENNETH O. EIKENBERRY
STATE OF WASHINGTON

Mr. Chairman and Members of the Subcommittee,

Again, let me begin by thanking the Chairman for holding these reconvened hearings today and thus providing not only myself, but other attorneys general as well, the opportunity to address specific proposals for bringing some reason and moderation into the award of attorney's fees, an area which not only my state, but every other state in the nation, finds to be of increasingly significant concern.

Before proceeding further, let me reaffirm the testimony which I gave on this same subject on July 23. I will not repeat that testimony, but I do want to emphasize that our concerns in this area have not disappeared, but instead have increased, since that date.

With that introduction, let me proceed to address each of the specific provisions of the proposed amendments to S. 585.

The first proposed amendment, reestablishing good faith immunity for governmental entities, is in my judgment absolutely essential, and I enthusiastically support it. I would only suggest, in the sense of adding pepper to the salad, that it be tightened even further by rephrasing the amendment in the following manner:

On line 5 strike all after "entity" and replace it with the following: "Unless the Court finds that the officials thereof acted in bad faith and without a reasonable belief that the actions complained of did not deprive any person of any rights secured to them by the constitution of the United States."

Proceeding to the specific attorney's fees amendments, I support, and urge the adoption of, the first amendment on lines 11 through 13, so far as it goes. The amendment does not, however, go far enough.

First, it is our position that "special circumstances" should be defined, if not in the bill itself, then in the committee report accompanying the bill. I believe that, as an absolute minimum, special circumstances should include both of the following elements:

(1) The plaintiff's ability to pay. For example, the Supreme Court currently has pending for decision a case involving a question as to whether or not the Consolidated Freightways Corporation is entitled to an attorney's fee award in what we call a "dormant commerce clause" case. That issue should simply have never gotten to that stage in litigation or that level of the judicial system. The District Court should have been able to

simply say "you don't need attorney's fees, Consolidated; go away." The very fact that the Consolidated Freightways Corporation, one of the nation's larger business entities, can make an argument that they are entitled to an award of reasonable attorney's fees against the State of Iowa, in the event that a dormant commerce clause case is a proper 1983 action, speaks volumes for the proposition that Congress simply *must* limit these awards to circumstances where the plaintiff has a demonstrated inability to pay the attorney's fees involved, and thus an award is necessary is order to promote the protection of constitutional rights.

(2) The nature and source of the funding of plaintiff's attorneys should likewise be a special circumstance, as a minimum. I would much prefer (and I will address this issue later) that publicly-funded attorneys and organizations be dealt with in the bill itself, at the very least the committee report should address this issue, in order to clarify Congress' intent. The fact that the attorneys prosecuting a successful 1983 action are already publicly-funded, and specifically that they are, in many cases at least, funded by the *very defendant* whom they are suing, should at the least be a special circumstance permitting, if not requiring, a district court to deny an award of reasonable attorney's fees, at least to the extent that such an attorney or organization is funded by the entity involved. In other words, if a legal services organization derives 50 percent of its funding from a state or municipality, and prevails in an action against that state or municipality, then the court should determine what a reasonable attorney's fee amounts to, and the publicly-funded organization should be entitled only to 50 percent of that amount, or whatever other percentage represents the percentage of non-public, or private funds involved in financing the organization.

Secondly, still with respect to the first proposed amendment, I would urge that the word "frivolous" be deleted. The addition of that word may make the standard which a prevailing defendant must show simply too difficult, and thus the protection against groundless suits which the amendment seeks to provide illusory. I would think that the necessary inhibition against groundless and unfounded litigation, and the necessary protection of plaintiffs acting in good faith, could be provided by the retention of the words "unreasonable, or groundless." I am afraid that making standard one of frivolity will simply make it far too difficult for prevailing defendants, who have been subjected to groundless litigations, to secure an award of attorney's fees.

With respect to the amendment contained in subsection (2)(b) I again enthusiastically support its substance. I would suggest that it be turned around, however, to more accurately reflect what I think its intent is, and that it read, commencing line 23 of the first page, as follows: ". . . the Court may not award attorney's fees unless it finds that the preponderant reason for such joinder was not to recover attorney's fees."

I support fully the proposed amendment contained in subsection (2)(c).

With respect to § (2)(d) I again endorse it as far as it goes. I would urge that on line 11, of page 2, the word "preponderant" be replaced with the word "sole" so that the last two lines of that subsection would read as follows: "Unless the sole reason for such change was the pendency of the litigation."

Again, with respect to § (2)(e) I would suggest some improvement. One of the great problems which states and municipalities are facing in this area is the award of attorney's fees based on services which are duplicative, which were cumulative, or which were in some other way wasteful or were not necessarily performed in order to secure the result attained. I would thus urge, in the strongest terms possible, that line 15 of page two include the word "necessarily," so that that line would read as follows: "Services necessarily and reasonably performed." I of course absolutely, and without qualification, support the proposed abolition of the grossest abuse in this area and that is the use by courts of contingency factors or multipliers in awarding attorney's fees. There simply is no room whatsoever for such windfall profits to attorneys in this area, to be gained solely from scarce public funds, and federalism, fiscal responsibility, due concern for the problems of states and municipalities, and simple common sense require that. If the Congress is to do nothing other than prohibit under any circumstances the use of multipliers, bonus awards, or contingency factors, it will have significantly improved public policy in this area.

The only suggestion I would make with respect to § (2)(f) of the proposed amendments is that it be made clear that the thirty-day limitation is jurisdictional. In other words, no after thought attorney's fees awards should be permitted, and certainly, as we have seen in the case of *White Mountain Apache v. Bracker*, cited in the NAAG Report accompanying my earlier testimony, the Congress should make it impossible to carry a final judgment in one non-1983 action over to another court and be compensated with an award of attorney's fees as a separate cause of action brought under § 1983. I think the bill itself, or the accompanying committee report, should make it absolutely clear that an award of attorney's fees may be based only on the final judgment in *that* action, and only when the complete application is submitted within thirty days of the final judgment.

Let me again emphasize, Mr. Chairman, that while I unhesitatingly support the proposed amendments, at the same time I urgently suggest to the Subcommittee that they do not go far enough. I again refer you to my earlier testimony given in July, to the testimony of Attorney General David Wilkenson of the State of Utah, given on the same day, and to the report of the National Association of Attorneys General, which is a part of your record. I strongly believe, as do most of my brother attorneys general, that each of the elements of the problem which we then discussed should be addressed by this Subcommittee, should be contained in a bill reported out by this Subcommittee, and should be accepted by the Congress.

Briefly, let me touch upon some of the major areas in which I believe that the proposed amendments fall short.

First, as I suggested earlier, we continue to see a serious problem with so-called double-dipping, the interference with fundamental concepts of federalism associated with federal court attorney's fee awards imposed upon states and municipalities in favor of attorneys and organizations which those same states and municipalities themselves fund. I again strongly urge the Subcommittee to include within its bill a provision denying attorney's fees to the extent that any organization is publicly-funded. Again, at the risk of repeating myself, we are not urging that legal services organizations, for example, be absolutely ineligible under all circumstances for attorney's fees awards. What we are saying is simply this: If a legal aid society or legal services organization operates entirely without public funds, than that organization should be treated just like a firm of private attorneys and should be eligible for an award of reasonable attorney's fees. If, on the other hand, that organization is either wholly, or partly, publicly-funded, then that source of their funds should, as an *absolute minimum*, be taken into consideration in determining an appropriate attorney's fee award. If an organization is 100 percent publicly-funded, they should be ineligible for any award of attorney's fees, at least from the public entity which funds them. If such an organization is only partially financed with public funds, then they should be eligible for an attorney's fee award only in the same percentage as they are financed with private funds. If thirty, or fifty percent of their financing is from public sources, then the reasonable attorney's fee determined in connection with that litigation should simply be reduced by a commensurate thirty or fifty percent to reflect that public funding.

Likewise, the bill itself, preferably, but at the very least the committee report, should deal with the burgeoning problem of duplication of effort, wasteful effort, compensation for attorney's services unnecessarily rendered, or rendered in such a fashion that they did not assist in any way in securing the result obtained on behalf of the prevailing plaintiff. Likewise, in my strong view, voluntary intervenors should be absolutely ineligible for an award of attorney's fees unless it is clearly demonstrated, and the Court finds, that their intervention was necessary, *and* that the intervenors attorneys rendered reasonable and necessary services which were essential to produce the result obtained. I do not believe that this Subcommittee should further countenance, Mr. Chairman, the wasteful expenditure of increasingly scarce public funds to compensate batteries of lawyers who sit around monitoring multi-party litigation, particularly under circumstances where many of those attorneys represent voluntary intervenors in the action, whose presence was not necessary in the first place, and who produce nothing toward securing the result obtained.

Departing from the area of attorney's fees, I would urge, in the strongest terms possible, that the Subcommittee not lose sight of the overall substantive problem, and that is the expanding liability which the states and municipalities are facing under § 1983 itself after *Maine v. Thiboutot*. Without repeating the earlier concerns which I expressed, I simply want to remind the Subcommittee of those major concerns.

You should report out, and the Congress should pass, S. 584 so that § 1983 is, in the future, used for its original intended purpose; that is the protection of legitimate, constitutionally-based, civil rights of this nation's citizens. Additionally, I earnestly hope that you will give serious consideration to the amendment I suggested to S. 584, in my July testimony, which would limit 1983 liability to "willful" actions which would limit awards to actual damages only, rather than punitive damages, even against individuals as contrasted from cities or states themselves. *City of Newport v. Fact Concerts* has solved only part of that problem. Do not lose sight of the fact that when individual public officers are held liable for punitive damages, that money must and does come, in almost every case, as a matter of governmental necessity, from a public treasury.

The Subcommittee should deal with the question of a 1983 litigant's need to exhaust adequate and appropriate state administrative remedies before bringing an action. In that respect, the Subcommittee should be aware of the fact that tomorrow that very issue will be argued in the Supreme Court in a case entitled *Patsy v. Board of Regents of the State of Florida*. Regardless of the outcome of that case, however, I recommend that you reaffirm and reiterate what I believe, and most of my colleagues believe, to be the original intent of Congress; that is where state law provides an adeqwuate and appropriate administrative remedy for the redress of any constitutional grievance, a prospective 1983 plaintiff must first avail himself or herself of such remedies before bringing an action, in either a state or federal court. I think that should always have been the case, I think that is always what Congress has intended, and I am simply recommending that you restate that intent at this time.

Finally, Mr. Chairman, I want to again restore my absolute and unalterable opposition to the passage of S. 990. The approach embodied in that bill does not, in my view, reflect sound public policy for this country today.

Again, thank you very much for the opportunity to make these remarks here today.

Senator DeConcini. We will keep the record open for 2 weeks for either panel that cares to submit any additional testimony. It will be taken and made part of the record, without objection, within bounds of volumes of information. We welcome any responses that anyone has.

Mr. Murphy. Mr. Corbin's testimony was given to me, incidentally, Senator, by Tony Cheng. He asked me to give you his best.

Senator DeConcini. Very good. Thank you. I may see him in about 10 days.

The subcommittee is adjourned, subject to the call of the Chair.

[Whereupon, at 4:05 p.m., the meeting was adjourned.]

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